86-1122

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix of the
Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of the
Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,

Appellants

v.

CITY OF PHILADELPHIA
and
PHILADELPHIA GAS WORKS
and
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION,

Appellees

APPEAL FROM JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Theodore A. Schwartz
M. MARK MENDEL, LTD.

Jerome Gamburg

*Counsel of Record

David F. Binder*
Alan M. Feldman
RAYNES, MCCARTY, BINDER,
ROSS & MUNDY
1845 Walnut St., Suite 2000
Philadelphia, PA 19103
(215) 568-6190
Attorneys for Appellants

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Does that section of Pennsylvania's Political Subdivision Tort Claims Act limiting the total damages recoverable by all victims against a tortious city or other local agency in Pennsylvania to an aggregate $500,000 when the victims' claims arise from the same accident (i.e., "from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences") violate the Equal Protection clause of the Fourteenth Amendment of the United States Constitution?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The five opinions from the Pennsylvania Supreme Court are published at 516 A.2d 306. They do not yet appear in the official Pennsylvania Reports. The opinions are appended hereto as Appendix A1-A5.

The opinion of the Philadelphia Court of Common Pleas, by the Honorable William M. Marutani, has apparently not been published. It is appended hereto as Appendix B.

GROUNDS OF JURISDICTION

This is an action brought pursuant to the Pennsylvania Declaratory Judgments Act[1] by three of seventy-two claimants who were victims (or the survivors of victims) of an underground gas explosion in the Bridesburg section of Philadelphia which occurred on May 11, 1979. A judicial determination was sought that, *inter alia*, a section of Pennsylvania's Political Subdivision Tort Claims Act violates the Equal Protection clause of the Fourteenth Amendment.

The Pennsylvania Supreme Court's divided decision upholding the constitutionality of the statutory provision, with five opinions by its members, was filed on October 3, 1986. See Appendix A1-A5. Notice of this appeal was filed in the Pennsylvania Supreme Court on December 24, 1986. See Appendix D.

Jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1257(2), for the reason that the validity of a Pennsylvania statute is drawn into question on the ground of its being repugnant to the Constitution, and the Pennsylvania Supreme Court's decision was in favor of its validity.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution

The Fourteenth Amendment, in pertinent part, provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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1. Act of July 9, 1976, P.L. 586, No. 142, §2, 42 Pa.C.S. §§7531-7541.

Statute

The relevant sections of Pennsylvania's Political Subdivision Tort Claims Act (42 Pa.C.S. §§8541 and 8553) are appended hereto as Appendix E. The challenged provision thereof, 42 Pa.C.S. §8553(b), provides:

> **Amounts recoverable.** — Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

STATEMENT OF THE CASE

On May 11, 1979, an underground gas explosion wreaked havoc and destruction near the intersection of Margaret and Tacony Streets in the Bridesburg section of Philadelphia, Pennsylvania. Seven people were killed, while many others suffered serious personal injuries. Homes and other property were extensively damaged.

Forty-four lawsuits on behalf of seventy-two separate claimants were filed in the Philadelphia Court of Common Pleas against the defendants herein, alleging that this disaster was caused by their negligence. Defendants responded, *inter alia*, by asserting that their liability for all of the claims was limited to a sum total of $500,000 based upon a provision of Pennsylvania's Political Subdivision Tort Claims Act.[2] These lawsuits are still pending.

In an attempt to facilitate the disposition of these cases, plaintiffs, who are three of the claimants, filed a declaratory judgment action in the same court seeking a judicial determination that the limiting statutory provision upon which defendants rely to avoid compensating the victims of the disaster for their real losses is unconstitutional. On plaintiffs' motion for summary

2. At the time of this accident, local agencies were provided immunity from civil liability (with certain specified exceptions) pursuant to the Political Subdivision Tort Claims Act, Act of November 26, 1978, P.L. 1399, No. 330, 53 P.S. §§5311.101-5311.803. This statutory enactment was repealed and replaced by the virtually identical Act of October 5, 1980, P.L. 693, No. 142, 42 Pa.C.S. §§8541-8564.

judgment, the Philadelphia Court of Common Pleas held that (1) the declaratory judgment vehicle was a proper mechanism to determine this controversy under Pennsylvania law, and (2) the aggregate damages limitation of the Act violates both the Pennsylvania constitution and the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. See Appendix B.

On direct appeal, the Pennsylvania Supreme Court reversed the judgment of the Philadelphia Court of Common Pleas. While agreeing that the declaratory judgment procedure was appropriate for resolution of the issue, a 5-2 majority decided that the statutory provision in question was constitutional.[3] See Appendix A1-A5.

Plaintiffs then filed this appeal.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented is substantial enough to require plenary consideration because (1) the decision of the Pennsylvania Supreme Court is unjust and improper, and sets a pernicious precedent for other states to follow; (2) the decision is inconsistent with the rationale of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S. Ct. 2620, 57 L.Ed.2d 595 (1978); and (3) the decision will have the immediate effect of denying justice to some or all of the seventy-two claimants whose cases are still pending in the Philadelphia Court of Common Pleas and who have suffered serious losses and damages from the explosive disaster which gives rise to this litigation.

Prior to 1978, cities and other municipal subdivisions of the Commonwealth of Pennsylvania enjoyed neither immunity nor

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3. Both the Philadelphia Court of Common Pleas and the Pennsylvania Supreme Court considered both state and federal constitutions. This appeal is concerned only with Part II of the Pennsylvania Supreme Court's opinion, reversing the Common Pleas Court's determination that the statutory provision violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

any restriction upon recoveries awarded in legal actions.[4] Statutory immunity was conferred for the first time by the Political Subdivision Tort Claims Act, which proceeded to identify two important government interests: allowing victims of governmental negligence to recover for injuries sustained in eight specified categories, and limiting potential recovery in order to protect fiscal stability.

In considering only the second government interest relating to conservation of public funds,[5] the Pennsylvania Supreme Court improperly ignored the legislative objective of providing a remedy to citizens injured by government tortfeasors. Nevertheless, there can be no doubt that the Act's imposition of liability for wrongful conduct by political subdivisions was plainly, palpably and unequivocally an important and essential objective of the statute. If the legislature's intention to allow recovery of damages to victims of government torts has not been satisfied, then the Act is not only not fairly related to one of the objectives of the legislation, it is fundamentally inconsistent with that objective, and plainly unconstitutional.

In the present case, the $500,000 aggregate limitation of damages unquestionably works a denial of equal protection upon at least some of those individuals the statute was intended to benefit. The Bridesburg gas explosion caused multiple deaths, personal injuries and extensive property damage affecting seventy-two claimants. Whomever runs fastest to the courthouse door and first obtains a verdict (or settlement) will deplete the available aggregate fund, and indeed if the first claim is a substantial one, there can be little or no recovery for the seventy-one remaining claimants. Under virtually any conceiveable set of circumstances, some claimants will have no remedy whatsoever, thereby frustrating the Pennsylvania General Assembly's intention to provide redress to a specified group of victims. *See White v. State of Montana*, 661 P.2d 1272 (Mont. 1983).

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4. Such immunity as may have existed was abolished by the Supreme Court of Pennsylvania in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973).

5. It should be noted that no evidence was presented by defendants suggesting that lawsuit recoveries had caused or contributed to fiscal difficulties.

This self-evident defect in the law is addressed by the Pennsylvania Supreme Court only in a footnote, wherein the Court stated (Appendix A1):

> . . . once claims have been filed, it is within the power of the trial court to regulate all claims, including settlements, administratively, such that all claimants receive a segment of the total fund proportionate to their injury. Further, should the trial court fail or refuse to coordinate such claims, relief may be sought in this Court.

However, the Court's suggestion that the legislative mandate of redress to victims of government torts may be effected "administratively" is at best speculative, if not completely illusory. More importantly, the fact remains that the Act itself provides no such opportunity for a proportionate recovery, and indeed invites in a multiple-claims situation, as here, the probability, if not certainty, that similarly circumstanced claimants will be treated in a dramatically unequal manner.

The statute's aggregate limitation on damages for all victims of a single occurrence not only fails to provide equal treatment for those equally injured by a municipality's negligence, but permits an inequality that is essentially capricious. A victim's compensation is made to depend not on how substantial his losses are, or how gross the defendant's conduct was, but on who else may have been damaged at the same time and the magnitude of other such claims. If, for example, five hundred men had been killed in the Bridesburg disaster, each widow would receive in compensation no more than $1,000, assuming the existence of a framework providing for proportionate treatment (which does not exist here). But if a man was the sole victim of a municipal tortfeasor in another accident, then his widow could recover $500,000 in compensation if supported by the evidence.

In holding the statutory limitation unconstitutional, Judge William M. Marutani, writing for the Philadelphia Court of Common Pleas, cogently described this feature of the Act as follows (Appendix B):

> Inherent in the aggregate dollar limitation per "occurrence" contained in the Tort Claims Act, 42 Pa.C.S.A. §8553(b), are the ingredients for inevitable unequal treatment of aggrieved claimants. The extent of monetary recovery for any particular claimant can and will vary by the happenstance of, among other factors, the number of co-victims involved in that same occurrence, the extent of injuries and losses incurred by each, and whether the single limited fund has been depleted when such claimant seeks ultimate payment. Yet, another citizen with identical losses or injuries, in a different but identical incident, may well recover a greater sum, if fewer victims with lesser losses or injuries were involved. Such a statutory impact constitutes denial of Equal Protection.

It is also important to note that the Act has not received uniform application in mass disaster situations involving multiple victims. The defendant City of Philadelphia, for example, has recently paid millions of dollars just for property damage caused when it improvidently dropped a bomb on a house in Philadelphia in an attempt to evict members of a radical group known as "MOVE." While choosing to ignore the aggregate limitation on damages in the MOVE catastrophe, the City has arbitrarily refused to pay the losses suffered by the property owners in Bridesburg, not to mention the claims on behalf of those killed and maimed by the gas explosion.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, the Supreme Court held that the $560 million aggregate limitation on damages for accidents resulting from the operation of federally licensed private nuclear power plants contained in the Price-Anderson Act, 42 U.S.C. §2210, did not violate the Due Process clause of the Fifth Amendment because of the presence of the following factors:

> 1. Congress' major objective in enacting the statute was to foster the growth of new technology, i.e., to stimulate the private development of electric energy by nuclear power in this country.

2. The possibility of an accident in which damages would exceed the limitation was "extremely remote." 438 U.S. at 86.

3. The Act provides for no-fault liability, extends short state statutes of limitation, and provides Congressional assurance of the availability of a fund of $560 million to pay claims.

4. The Act contains "an express commitment by Congress to take whatever further steps are necessary to aid the victims of a nuclear accident." 438 U.S. at 86 n. 31.

5. The Act does not leave potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies.

None of the factors which saved the $560 million aggregate limitation on damages provision in the Price-Anderson Act from constitutional violation are present to save the $500,000 aggregate limitation on damages provision in Pennsylvania's Political Subdivision Tort Claims Act. On the contrary:

1. The Pennsylvania legislature did not enact the Tort Claims Act for the purpose of stimulating economic development.

2. The possibility of an accident in which damages would exceed the limitation is not only not "extremely remote," but virtually certain to occur repeatedly.

3. The statute does not provide for no-fault liability for municipalities, does not extend statutes of limitation, and sharply curbs the amount of the fund available for payment of claims.

4. The statute contains no commitment by the legislature, express or implied, to take such further steps as are necessary to aid the victims of an accident in which damages exceed the aggregate limitation.

5. The statute plainly leaves potential victims of a municipality's negligence in a more disadvantageous position than they would be in if left to their common law remedy, which permitted full and fair compensation without restriction.

Because the Political Subdivision Tort Claims Act fails to satisfy the criteria upon which the damages limitation in the Price-Anderson Act was found to pass constitutional scrutiny, plenary consideration of this appeal is necessary to reconcile the instant case with this Court's opinion in *Duke Power*.

On a more parochial note, there remain seventy-two victims of this 1979 disaster who will receive little or nothing in compensation if the Pennsylvania Supreme Court's decision is permitted to stand, nothwithstanding the legislative objective to provide redress for this class of claimants. As Judge Marutani observed in his opinion holding the aggregate limitation on damages unconstitutional (Appendix B):

> While numerous examples of inequality might be recited, the gas explosion "occurrence" in the instant proceeding, involving 72 victims (including seven deaths), is illustrative of the unequal consequences inherent in the aggregate dollar limitation. Compounding their misfortune, each of the 72 victims' monetary recovery will be diluted by the happenstance that there are 71 other victims with claims founded upon the same occurrence. Yet a single victim in another incident involving identical losses or injuries would be eligible to recover far more, including full monetary redress if the loss did not exceed $500,000.00.

CONCLUSION

Whether the object be to right a wrong done these seventy-two victims by the inherently unfair application of the Act, or to reconcile this case with the Supreme Court's opinion in *Duke Power*, or to prevent the damage that will surely result from the unfortunate precedent of the Pennsylvania Supreme Court's decision if not reversed, this case merits plenary consideration by the Supreme Court.

Respectfully submitted,

Theodore A. Schwartz
M. MARK MENDEL, LTD.

Jerome Gamburg

David F. Binder*
Alan M. Feldman
RAYNES, MCCARTY, BINDER, ROSS & MUNDY
1845 Walnut Street, Suite 2000
Philadelphia, PA 19103
(215) 568-6190

Attorneys for Appellants
*Counsel of Record

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellees*	:	Nos. 70, 71, & 74 Appeal Docket 1984
v.	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, May Term, 1982, No. 6409 dated April 3, 1984.
CITY OF PHILADELPHIA and PHILADELPHIA GAS WORKS and PHILADELPHIA FACILITIES MANAGEMENT CORPORATION, *Appellants*	:	ARGUED: January 23, 1986

OPINION OF THE COURT

MR. JUSTICE FLAHERTY Filed: October 3, 1986

Section 8553 of the Political Subdivision Tort Claims Act, Act of October 5, 1980, P.L. 693, No. 142 §221 (1), as amended, 42 Pa.C.S.A. §8553, limits recovery of damages against political subdivisions of the Commonwealth to $500,000 in the aggregate for legally cognizable tort injuries arising from the same transaction. The question in this case is whether this limitation is constitutionally permissible.

On May 11, 1979 a gas explosion in the Bridesburg section of Philadelphia killed seven persons, injured many others, and caused extensive property damage. Forty-four separate actions

on behalf of seventy-two claimants were filed for property damage, death and personal injury. After their initial tort claims had been filed, Ruth V. Smith and two other plaintiffs filed a declaratory judgment action seeking a declaration that the Political Subdivision Tort Claims Act is unconstitutional in its limitation of damages to an aggregate amount of $500,000.

Plaintiffs also moved for summary judgment in the declaratory judgment action. The Court of Common Pleas of Philadelphia granted the plaintiff's motion for summary judgment and held that the provision of the Political Subdivision Tort Claims Act, which limits damages to an aggregate amount of $500,000, violates Art. III, Section 18 of the Pennsylvania Constitution, Article III, Section 32 of the Pennsylvania Constitution, and the Fourteenth Amendment to the United States Constitution.

A direct appeal to this Court was taken pursuant to 42 Pa.C.S.A. §722 (7). For the reasons that follow, we reverse.[1]

I

CONSTITUTIONAL AUTHORITY TO LIMIT TORT RECOVERY AGAINST THE COMMONWEALTH

The statute in question, 42 Pa.C.S.A. 8553(b), the Political Subdivision Tort Claims Act, provides:

> Amounts recoverable—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

Article I, Section 11 of the Pennsylvania Constitution provides, in pertinent part:

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1. Various procedural objections have been raised concerning the propriety of trial court's issuing a declaratory judgment in a case in which there was already pending another action for damages arising from the same transaction. Because the interests of judicial economy are best served by our addressing the merits of the case now, rather than after forty-four judgments have been rendered and the same issue is raised on appeal, and because the parties are better served by an early determination of the constitutional question, we address the merits of the constitutional questions presented.

> Suits may be brought against the Commonwealth in such *manner*, in such *courts* and in such *cases* as the Legislature may by law direct.

(Emphasis added). The Court of Common Pleas determined that although the Legislature has the power to regulate the *manner*, the *courts* and the *cases* which may be brought against the Commonwealth,[2] it has no power to limit the *amount of damages* which may be recoverable in a particular case.

The lower court also held that Article III, Section 18 prohibits any legislative limitation on damages in cases brought against the Commonwealth or its political subdivisions. Article III, Section 18, in pertinent part, provides:

> [Other than workmen's compensation] in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property. . . . .

Since this is a case other than a workmen's compensation case, the Court of Common Pleas reasoned that the General Assembly had no authority to limit the amount to be recovered for injuries to persons or property.

We begin our review of the lower court's holding by observing, as mentioned earlier, Article I, Section 11 of the Pennsylvania Constitution permits the legislature to regulate the manner, the courts and the cases in which suits may be brought against the Commonwealth. In granting the legislature power to control not only the cases, but also the manner and the courts in which cases against the Commonwealth may be brought, the Framers intended that the legislature have complete control over suits brought against the Commonwealth. Plaintiffs agree that the legislature has complete control in that it could abolish altogether the right to recover against the Commonwealth in tort actions, but they assert that the legislature has no power to limit the amount of recovery in actions which it has said may be

2. In *Caroll v. County of York*, this Court stated that the term "Commonwealth" encompasses political subdivisions. 496 Pa. 363, 366, 437 A.2d 394, 396 (1981).

brought. We disagree. If the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted. To hold otherwise would be, in our view, to grant with one hand what we take away with the other. Such a result would be absurd, or at least, unreasonable.[3] We conclude, therefore, that Article I, Section 11 should not be read to prohibit the Legislature from enacting a limit on the tort liability of its political subdivisions.

In addition, we disagree with the Common Pleas Court's conclusion that Article III, Section 18 prohibits the statutory limitation of damages against the Commonwealth or its subdivisions. As this Court stated in *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975), "the full scope and meaning of [Article III, Section 18] should be considered . . . in light of the evil intended to be remedied by its adoption." *Id.* at 396, 346 A.2d at 901. Article III, Section 18[4] was drafted in 1872 and 1873, and adopted in 1874 in response to the fact that certain powerful private interests had been able to influence legislation which limited recovery in negligence cases filed against them.

In particular, the Framers were reacting to the passage of the Act of April 4, 1868, P.L. 58, which limited recoveries in negligence actions against railroads and other common carriers. II *Debates of the Convention to Amend the Constitution of Pennsylvania*, 742-44 (1873). *See also* White, *Commentaries on the Convention to Amend The Constitution of Pennsylvania* (1907). The corporations who effected this legislation were perceived by the Framers as a privileged and powerful class of overreachers who had purchased special, self-serving legislation, and Article III, Section 18 was meant to prevent such powerful private interests from unduly affecting the legislative process. Consideration of the full scope and meaning of Section 18, therefore,

3. Absurd, impossible or unreasonable results are not favored by the Statutory Construction Act, 1 Pa. C.S.A. §1922, the general principles of which have been applied to questions of constitutional as well as statutory interpretation. *Montgomery v. Martin*, 294 Pa. 25, 143 A.2d 505 (1928).

4. Except for an amendment in 1915 exempting workmen's compensation laws from the requirement that recoveries not be limited, and the renumbering of the section in 1967, Section 18 has remained unchanged.

reveals that the Framers were addressing themselves to private, not governmental defendants.

It has been argued, however, that the language of Article III, Section 18 applies to all cases, not merely those involving private defendants ("in no other cases shall the General Assembly limit the amount to be recovered") and that the section should not be construed as applicable only to private parties. This argument ignores that the Framers would have had no occasion to apply the prohibition against limiting damages to government, for government, at that time, was immune from suit. It was not for more than 100 years after this provision was drafted that this Court in *Mayle v. Pennsylvania Depart. of Highways*, 479 Pa. 384, 388 A.2d 709 (1978) abrogated common-law sovereign immunity.

We conclude, therefore, both because the intended scope of this section was to prevent *private parties* from securing an unfair limitation of liability through influence in the General Assembly, and because the Framers would have had no reason to concern themselves with governmental liability in tort, that Article III, Section 18 does not operate to restrict the General Assembly from providing for less than full recovery for injuries to persons or property where the defendant is a governmental entity.[5]

II

EQUAL PROTECTION

Even though we have determined that the statute does not exceed the power granted to the Legislature in Article I, Section 11 or Article III, Section 18 of the Pennsylvania Constitution,

5. Our holding in this case is reinforced by the fact that "An Act of Assembly will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution." *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963) (Emphasis in original). *See also James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1984). Moreover, any uncertainty as to the constitutionality of a statute must be resolved in favor of its validity. *Milk Control Commission v. Battista*, 413 Pa. 652, 198 A.2d 840 (1964).

plaintiff-appellees contend, nevertheless, that the damage limitation violates the Equal Protection Clause of the United States Constitution and Article III, Section 32 of the Pennsylvania Constitution. The Equal Protection Clause, in pertinent part, provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 32 of the Pennsylvania Constitution provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law. . . .

This Court has determined that these provisions, federal and state, have "meaning and purpose sufficiently similar to warrant like treatment." *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 67 n. 13, 436 A.2d 147, 155 n.13 (1981).

The claim here being asserted, in essence, is that because there is a $500,000 limit on recoveries in tort cases filed against political subdivisions of the Commonwealth, but there is no such limit against private parties, or even against the Commonwealth itself, where the limit is $1,000,000,[6] the damages limitation provision of the Political Subdivision Tort Claims Act is violative of the Fourteenth Amendment's requirement of equal protection of the laws.[7]

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6. The Sovereign Immunity Act, 42 Pa. C.S.A. §8528(b).

7. Appellees also assert that the act impermissibly classifies tort claimants against the government in that those who settle first or file their claims first may exhaust the total fund available for all claimants. This claim is without merit.

Firstly, the case where there are multiple claims against the government arising from the same transaction is not that different, practically speaking, from a case where there are multiple claims against a private tortfeasor, and the defendant has only limited insurance coverage.

Secondly, once claims have been filed, it is within the power of the trial court to regulate all claims, including settlements, administratively, such that all claimants receive a segment of the total fund proportionate to their injury. Further, should the trial court fail or refuse to coordinate such claims, relief may be sought in this Court.

Most recently in *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984), we observed that the Fourteenth Amendment does not absolutely prohibit the states from classifying persons differently and treating the classes in different ways. As this Court stated in *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. at 68, 436 A.2d at 155 (1981), "The concept of equal protection . . . demands that uniform treatment be given to similarly situated parties. . . . If classifications are drawn, then the challenged policy must be reasonably justified." What counts as justification will depend upon which of three types a classification belongs to, what the governmental interest is in promulgating the classification, and the relationship of that interest to the classification itself. *James v. SEPTA* at 145, 477 A.2d at 1306. Different types of governmental interests and different degrees of closeness of relationship between the interest and the classification are required depending upon the type of classification involved.

The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. *Id.* Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

In *James*, the statute in question required that persons suing the transit authority for personal injuries bring their suit within six months, whereas persons suing non-governmental tortfeasors were permitted to bring their suits at any time within two years. In order determine whether this differential access to the courts is constitutionally permissible, we first examined the nature of the right involved in the case. The most protected rights, fundamental rights, are those which have their source, explicitly or implicitly, in the Constitution. *James v. SEPTA*, *Id.* at 146, 477 A.2d at 1306, citing *Plyler v. Doe*, 457 U.S. 202, 216,

n. 15 (1982). Because the right implicated in *James* — access to the courts — is specifically limited by Art. I, §11 of the Pennsylvania Constitution, we concluded that it is not a fundamental right.

We held, however, that James had an important interest in access to the courts and therefore, that the statute in question should be examined pursuant to an intermediate standard of review. This standard of review requires that the government interest be an "important" one; that the classification be drawn so as to be closely related to the objectives of the legislation; and that the person excluded from an important right or benefit be permitted to challenge his exclusion on the grounds that in his particular case, denial of the right or benefit would not promote the purpose of the classification. *James v. SEPTA*, *Id.* at 147, 477 A.2d at 1307. We concluded the analysis in *James* by upholding the statute on the grounds that the statute promoted an important governmental interest the realization of which was closely related to the classification.

In the present case, an almost identical analysis is applicable. No fundamental rights are implicated because the right to a full recovery in a tort suit brought against the Commonwealth or its political subdivisions is expressly limited by our interpretation of Article III, Section 18 and Article I, Section 11 of the Pennsylvania Constitution (permitting the legislature to limit recovery against governmental units). Strict scrutiny of the classification, therefore, is not required.

Again, as in *James*, although the right to a full recovery in cases brought against the Commonwealth has been constitutionally limited, that right is, nevertheless, generally an important right and its limitation by way of governmental classification requires a heightened scrutiny of the validity of the classifying statute. The governmental interest, preservation of the public treasury as against the possibility of unusually large recoveries in tort cases, is, self-evidently, an important governmental interest. Furthermore, this important interest is closely related to the classification established by the statutory scheme: only persons who might recover against the Commonwealth or its subdivisions are affected. Finally, just as in *James*, since only those who

might recover against the Commonwealth are affected adversely by the classification and since all persons who fall into this classification will promote the governmental purpose by their inclusion, there is no requirement for any hearing process to determine whether some persons should not be included in the classification. The Political Subdivision Tort Claims Act, therefore, is constitutional.

The order of the Court of Common Pleas of Philadelphia is reversed.

Mr. Chief Justice NIX joins the Majority Opinion and files a separate Concurring opinion.

Mr. Justice HUTCHINSON joins Part I of the M O and joins in a separate CONCURRING OPINION by Mr. JUSTICE ZAPPALA.

Mr. Justice ZAPPALA joins in Part I of the M O and files a Concurring Opinion joined by Mr. Justice HUTCHINSON.

Mr. Justice LARSEN files a Dissenting Opinion which Mr. Justice PAPADAKOS joins.

Mr. Justice PAPADAKOS files a DISSENTING OPINION joined by Mr. Justice LARSEN.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellees*	:	Nos. 70, 71, & 74 Appeal Docket 1984
v.	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, May Term, 1982, No. 6409 dated April 3, 1984.
CITY OF PHILADELPHIA and PHILADELPHIA GAS WORKS and PHILADELPHIA FACILITIES MANAGEMENT CORPORATION, *Appellants*	:	ARGUED: January 23, 1986

CONCURRING OPINION

NIX, C.J. Filed: October 3, 1986

I join the opinion of the majority. I do, however, wish to note that I appreciate the concern of the concurring justices. Mr. Justice Flaherty is unquestionably correct in concluding that the right of access represents a fundamental right and that its denial should require the application of the "heightened scrutiny" standard of review. Whether every limitation upon that right is to be accorded the same status as an absolute denial of access or where to draw the line pose much more difficult questions. In this matter, the question fortunately is academic because, under either standard, the result is the same.

Suffice it to say that, in my judgment, not all legislative restrictions which impact upon access to the courts will require the

"heightened scrutiny" analysis. *See, e.g., Kras v. United States*, 409 U.S. 434 (1973). Moreover, I do not understand the majority to disagree with this view.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellees*	:	Nos. 70, 71, & 74 E.D. Appeal Dockets 1984
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CONCURRING OPINION

JUSTICE ZAPPALA Filed: October 3, 1986

While I join in Part I of the majority opinion regarding the constitutional authority to limit tort recovery against the Commonwealth and concur with the result, I once again disagree with the majority's determination that an intermediate or "heightened scrutiny" standard of review is appropriate. *See James v. SEPTA*, 505 Pa. 137, ____ , 477 A.2d 1302, 1308 (1984) (Concurring Opinion of Zappala, J.) As in *James*, I would hold that the proper standard of review is the rational basis test. Under the present facts, this test was met.

Mr. Justice Hutchinson joins in this Concurring Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellees*	:	Nos. 70, 71, & 74 E.D. Appeal Docket 1984
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CITY OF PHILADELPHIA and PHILADELPHIA GAS WORKS and PHILADELPHIA FACILITIES MANAGEMENT CORPORATION, *Appellants*	:	ARGUED: January 23, 1986

DISSENTING OPINION

JUSTICE ROLF LARSEN Filed: October 3, 1986

In the instant case, Section 8553 of the Political Subdivision Tort Claims Act (the Act), 42 Pa.C.S.A. §8553, requires that seventy-two claimants, including the estates of seven persons who were killed in the gas explosion and many who were seriously injured and maimed, seek recompense for their injuries from a paltry pool of $500,000.00, the maximum aggregate liability that may be imposed against the City of Philadelphia, or any other political subdivision in this Commonwealth, for damages arising out of the same cause of action.

For the reasons stated in Justice Papadakos' dissenting opinion, which I join, I believe the Act clearly and palpably violates Article I, Section 11 and Article III, Section 18 of the Pennsylvania Constitution. Additionally, I repeat the objection voiced in my dissenting opinion in *Carroll v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981) that political subdivisions are not "the Commonwealth" and that, therefore, Article I, Section 11 of the Pennsylvania Constitution by any interpretation could not provide a basis for legislation designed to limit the liability of political subdivisions. 496 Pa. at 379-381, 437 A.2d at 402-403 (dissenting opinion by Larsen, J., joined by Flaherty and Kauffman, JJ.). As I stated in *Carroll:*

> The majority opinion glosses over the complex issues in this case by the simple expedient of equating "political subdivisions" with "the Commonwealth." The majority hones in on the second proviso of Article I, §11 ("suits may be brought *against the Commonwealth* in such manner and in such cases as the legislature may by law direct.") and, on *exceedingly* meager authority, concludes "[s]urely the Legislature's authority 'to choose cases in which the Commonwealth should be immune' encompasses political subdivisions." At 396. By use of this legal slight-of-hand, relying *only* on a case which states that municipal corporations are agents of the state, *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976), the majority concludes that "the conferring of tort immunity upon political subdivisions is within the scope of the legislature's authority pursuant to Article I, Section 11." At p. 396.
>
> The second sentence in Article I, §11 provides: "Suits may be brought *against the Commonwealth* in such manner, in such courts and in such cases as the legislature may by law direct." (emphasis added); it does *not say* "suits may be brought against the Commonwealth *and its subdivisions*, etc." It is quite obvious that this proviso is *irrelevant* to the instant case. Whatever authority this proviso may grant to the General Assembly to enact legislation conferring immunity upon the Commonwealth *(see Mayle v. Pennsylvania*

Dept. of Highways, 479 Pa. 384, 388 A.2d 709 (1978)), it has no bearing on the authority of the General Assembly to confer immunity upon political subdivisions.

> A political subdivision is most certainly not "the Commonwealth". . . .

Id. at 379-380, 437 A.2d at 402-403. Also, *compare Brown v. Commonwealth*, 453 Pa. 566, 305 A.2d 868 (1973) *with Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973).

Furthermore, I continue to adhere to the view that the classifications established by the Act based solely on the status of the defendant are arbitrary and violate equal protection principles embodied in the Constitutions of this Commonwealth and of the United States. *James v. SEPTA*, 505 Pa. 137, 149-152, 477 A.2d 1302, 1308-09 (1984) (Larsen, J., dissenting). Article I, Section 26 of the Pennsylvania Constitution, adopted May 16, 1967, provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." And the equal protection clause of the Fourteenth Amendment directs that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."

As I stated in *Carroll, supra:*

> *serious* equal protection problems are raised by legislative classification based *solely* on the identity and/or status of one of the parties. [As] this Court's recent decisions have uniformly and unequivocally stressed, there are *"no reasons whatsoever"* for immunities that are strictly status-based. *Ayala v. Philadelphia Board of Public Education, supra*, 453 Pa. at 592, 305 A.2d 877 (1973) (emphasis added). We further stated in *Ayala*, per Justice Roberts, "we must agree with Chief Justice Traynor of the California Supreme Court

> that 'the rule of governmental immunity is an anachronism, *without rational basis*. . . .' " *Id.*, 453 Pa. at 592, 305 A.2d 877.[9]

Carroll v. County of York, *supra* at 496 Pa. 381-382, 437 A.2d at 403-404.

This Court subsequently decided in *James v. SEPTA*, *supra*, that an intermediate or heightened standard of review was the appropriate standard for reviewing the Act in light of the "important," but not "fundamental," interests at stake. In my view, regardless of whether we employ a "strict scrutiny," "heightened scrutiny," or "rational basis" standard of review, the classifications created by the Act based solely on the identity and status of the tort-feasor are arbitrary, do not bear a fair and substantial relation to any *legitimate* state purpose, and deny to the claimants the enjoyment of their civil rights and equal protection of the laws under the state and federal constitutions. *See Martin v. Unemployment Compensation Board of Review*, 502 Pa. 282, 306-326, 466 A.2d 107, 119-130 (1983) (Larsen, J., dissenting, joined by Flaherty, J.)

Mr. Justice Papadakos joins this dissenting opinion.

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9. Thus, even under the traditional "rational basis" test (i.e., whether a classification is reasonable, not arbitrary, and rests upon a difference having a fair and substantial relation to a legitimate legislative purpose. *See Moyer v. Phillips*, 462 Pa. 395, 341 A.2d 441 (1971) *and Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975)) a classification based *solely* on status is in a grave constitutional predicament. An argument might, moreover, be legitimately advanced that the standard of review of this legislation should be "strict scrutiny", *Baltimore & Ohio Railroad Co. v. Commonwealth Dep't of Labor and Industry*, 461 Pa. 68, 83 n.11, 334 A.2d 636 n.11 (1975), as "it is fundamental to our common law system that one may seek redress for every substantial wrong." *Ayala v. Philadelphia Board of Public Education*, *supra* 453 Pa. at 594, 305 A.2d 877 quoting *Niederman v. Brodsky*, 436 Pa. 401, 403, 261 A.2d 84, 85 (1970).

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased, and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased, and CHARLES ALEXANDER SCOTT,	:	70, 71 and 74 E.D. Appeal Docket 1984
Appellees	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, May Term, 1982, No. 6409 dated April 3, 1984.
v.	:	
CITY OF PHILADELPHIA and PHILADELPHIA GAS WORKS and PHILADELPHIA FACILITIES MANAGEMENT CORPORATION,	:	
Appellants	:	ARGUED — January 23, 1986

DISSENTING OPINION

MR. JUSTICE PAPADAKOS Filed: October 3, 1986

Once again this Court has embroiled itself in a continuing drama over whether the Commonwealth and its political subdivisions are immune from suit for injuries they cause and, if they are, whether they can limit the amount of damages recoverable against them for such injuries. *Carrol v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981); *Gibson v. Commonwealth*, 490 Pa. 156, 415 A.2d 80 (1980); *Dubree v. Commonwealth*, 481 Pa. 540, 393 A.2d 293 (1978); *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978); *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973); *Commonwealth v. Berks County*, 364 Pa. 447, 72 A.2d 129

(1950); *Merchants Warehouse v. Gilden*, 349 Pa. 1, 36 A.2d 444 (1944); *Monogahala Navigation Company v. Coons*, 6 Watts and Sergeant 101 (1843).

At issue is the interpretation of two sections of our Constitution which the majority continues to interpret to vest authority in the Legislature to decide for itself the extent to which the Commonwealth and its political subdivisions shall be immune from suits and to the extent it shall be subject, if at all, to pay damages for injuries caused.

Because I disagree with the majority's conclusions on both questions at hand, I dissent.

Article I, Section 11 of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

This section, as presently worded, has been part of the organic law of this Commonwealth since 1790. In my opinion, this Section can be interpreted properly only if it is read in its entirety, for only then can a reading be made that will give consistent effect to the whole section.

As a starting point, I refer to the eloquent comments of the late Mr. Justice Manderino, whose dissenting views in *Brown v. Commonwealth*, 453 Pa. 566, 305 A.2d 868 (1973), best summarize my views on Article I, Section 11's interpretation:

Section 11 has two sentences and they must be read together. . .

> The first sentence of Section 11 is unequivocal. It protects everyone — without exception — for all injuries. It specifically speaks of injuries to *lands*, *goods*, *person* or *reputation*. The first sentence says that everyone *shall have remedy* by due course of law — it does not say that sometimes there is a remedy and sometimes not. The sentence

> states that right and justice shall be administered *without . . . denial* — it does not say justice can be denied sometimes and sometimes not. The first sentence of Section 11 must be read before proceeding to sentence two, and that first sentence could not have been written in more absolute terms even by one possessing divine rights. Can we possibly destroy the absolutely plain meaning of sentence one by an interpretation of sentence two, which requires a reach outside the people's *written constitution*? The *written constitution* contains no mention of immunity for the state — or inherent rights of the state — or inalienable rights of the state — or indefensible rights of the state. It is thus necessary for the majority to begin its interpretation of sentence two by reaching *outside the written constitution*. Just where that reach extends, we are not told.
>
> If sentence two of Section 11 can be reasonably interpreted without destroying the clear meaning of sentence one or doing violence to the purpose of the entire Article in which the Section appears, we are bound in the name of reason to so interpret sentence two of Section 11. The only reasonable meaning of sentence two, in context, must be that it gives the legislature the right to implement procedurally the substantive rights granted so absolutely in the first sentence of Section 11.

Brown at 582-583, 305 A.2d at 876.

Everyone is guaranteed a remedy for his injuries and an open court in which to air the grievances. *Commonwealth ex rel. Duff v. Kienan*, 347 Pa. 574, 33 A.2d 244 (1943); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853). The first sentence of Article I, Section 11 sets forth that a complete scope of remedies shall be available to individuals for all harms done to them. This first sentence represents a constitutional limitation against the Legislative Power and guarantees that no governmental action can lessen in any way the rights of the people to seek redress for injuries suffered. No exceptions are contained in this sentence, and the guarantee is mandatory. This provision is also self-executing. It can take effect without the aid of legislation,

and being contained in the "bill of rights" is by its very nature self-executing. This right, reserved by the people from the general government, does not require the Legislature to make it effective. The use of "shall" indicates that the provisions are effective without legislation. See, *Commonwealth by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973); *O'Neill v. White*, 343 Pa. 96, 22 A.2d 23 (1941); *Erdman v. Mitchell*, 207 Pa. 79, 56 A. 327 (1903), and Article I §25 of the Pennsylvania Constitution which declares that everything in Article One "is excepted out of the general powers by government and shall forever remain inviolate."

Sentence two, however, has caused a raging judicial and legislative debate over the last twenty years. Its proper relation to sentence one is crucial to its proper application to the issues raised in this case.

This Court has, at times, ruled that this sentence created a basis for immunity from suits against the Commonwealth, and its political subdivisions. *Brown v. Commonwealth*, 453 Pa. 566, 305 A.2d 868 (1973); *Commonwealth v. Orsati*, 448 Pa. 72, 292 A.2d 313 (1972); *Conrad v. Commonwealth, Department of Highways*, 441 Pa. 530, 272 A.2d 470 (1971); *Meagher v. Commonwealth*, 439 Pa. 532, 266 A.2d 684 (1970); *Bennard v. New York State Natural Gas Corp.*, 404 Pa. 269, 172 A.2d 306 (1961); *Stauffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960); *Commonwealth v. Berks County*, 364 Pa. 447, 72 A.2d 129 (1950). At other times we have ruled that this section creates no immunity from suits in favor of the Commonwealth or its subdivisions. *Mayle v. Pennsylvania Department of Highways*, 479, Pa. 384, 388 A.2d 709 (1978) (abolishing sovereign immunity); *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973) (abolishing local governmental immunity); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971) (abolishing parental immunity); *Flagiello v. Pennsylvania Hospital*, 471 Pa. 486, 208 A.2d 193 (1965) (abolishing charitable immunity).

Currently in vogue is the following interpretation of the meaning of sentence two of Article One, Section 11:

> We now believe that this constitutional provision does not forbid judicial abrogation of the doctrine. Rather the Constitution is . . . neutral — it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a nonconstitutional manner. . . .

Mayle at 400, 388 A.2d at 716.

This reading would vest authority in the Legislature to raise the shield of immunity at will. In effect, the permissive language of the second sentence is being read as a qualification of the mandatory limitation placed on the legislative power by the first sentence. I am troubled by this interpretation for various reasons.

First, Article I of our Constitution is a *Declaration of Rights*. Each of the 26 Sections is concerned with withholding rights from the State.

> To isolate one sentence out of twenty-six sections in the Declaration of Rights and say that it should be interpreted to protect the rights of the state — not the people — is ludicrous and violates all reasonable principles of construing written language in proper context.

Brown, at 581, 305 A.2d at 875 (Dissent of Mr. Justice Manderino).

Both sentences of Section 11 must be read in a consistent manner which preserves for the people the various rights retained by them in the first sentence. Sentence two, which is framed in permissive language ("may" instead of "shall"), must be read in such a manner, then, that it does not qualify the imperative of Sentence 1, but in a way so that it complements that sentence. Had the second sentence read:

> Suits *shall* be brought against the Commonwealth *only* in such manner, in such courts and in such cases as the Legislature *shall* by law direct. . . .

I would agree that Legislative Power existed on the subject of its immunity, but as the language exists, the only reasonable meaning of the second sentence, in context, is that the people

have given the Legislature the option of creating a separate procedure for the litigation of cases where it or its subdivisions are involved. If it chooses not to legislate, however, that does not mean that right of redress does not exist, because that substantive right is declared by the first sentence. The courts are open and can litigate all forms of actions between parties as long as the Legislature does not indicate that its cases should be handled in another manner. In this respect, I view the Act of September 28, 1978, P.L. 788 No. 152, 1 Pa.C.S. §2310, as the Legislature's desired method of proceeding against the Commonwealth in eight types of cases. Similarly, in the Political Subdivisions Tort Claims Act of November 26, 1978, P.L. 1399, 42 Pa.C.S. §8541-64, the Legislature has indicated the manner of proceedings against the Commonwealth's Political Subdivisions in eight areas. But neither act can raise immunity as to other areas not covered by the acts because no such power is vested in the Legislature. To the extent that either of those acts attempts to create a shield of immunity for injuries caused, I would hold those sections to be unconstitutional.

This Court has already recognized that the people have not written immunity into the Constitution. *Mayle, Ayala, Carroll*. It is not a power delegated to the elected representatives. How is it, then, that anyone can reason that the section is "neutral" on the issue? If the power is not specifically delegated by the people, it is withheld and cannot be exercised by the government under the guise of "neutrality." The current interpretation of "neutrality" is judicial double-talk, with which I disagree. We have always held that the constitution is not a grant of power to the Legislature; rather, it is a limitation of the powers exercised by the Legislature. *Luzerne County v. Morgan*, 263 Pa. 458, 107 A. 17 (1919); *Collins v. Commonwealth*, 262 Pa. 572, 106 A. 229 (1919); *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910); *In Re: Likins*, 223 Pa. 456, 72 A. 858 (1909); *Appeal of Lewis*, 67 Pa. 153 (1870); *Page v. Allen*, 58 Pa.338 (1868); *Commonwealth v. Hartman*, 17 Pa.118 (1857); *Norris v. Clymer*, 2 Pa. 285 (1845). The limitations on the powers of the Legislature are not to be determined from the general body of law, but from the Constitution itself. *Erie & N.E.R. Co. v. Casey*, 26 Pa. 287 (1856).

Furthermore, as Chief Justice Thompson stated in *Page v. Allen*, 58 Pa. 338, 346 (1868), "The expression of one thing in the constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated,' expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense."

Nothing is clearer to me than the plain, untechnical language of Section 11. It simply guarantees that all people shall have remedies for their injuries without exception. Sentence two merely gives the Legislature the option of creating special Courts, Boards and Tribunals to handle controversies where they or their instrumentalities are parties. One need only review the Consolidated Statutes of the Legislature to find the countless Boards, Commissions, Agencies and Courts created for this very purpose (for example, see the Administrative Code, Eminent Domain Code, Liquor Code, Municipalities Planning Code, various City, Borough, Township, and County Codes, Vehicle Codes, and Jurisdiction of the Commonwealth Court). It is also interesting to note that at about the time this Section became part of the Constitution, the Legislature was known to authorize, by statute, the appearance of the Attorney General before this Court to defend actions against the Commonwealth and to authorize the appropriation of monies to pay for damages owed by the Commonwealth, *without limitation*.

What is even clearer is the direct, mandatory language of Article III, Section 18 which provides, in pertinent part:

> Other than Workmen's Compensation, in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property. . . .

The majority concludes that since the Legislature has the authority to raise a shield of immunity against itself for injuries the Commonwealth causes, thereby reducing the recovery to nothing, it can likewise condition recovery to specific amounts

for suits it permits, as it has attempted to limit here to $500,000.00 in the aggregate.[1]

This conclusion is reached by reference to the concerns and debates of the Drafters of the 1874 Constitutional Convention which drafted Article III, Section 18 as a reaction against legislation favorable to common carriers which limited damages recoverable against them. Additionally, the majority assumes that the Drafters of the Constitution might have imagined that the Commonwealth and its subdivisions were immune from suit in 1874 for injuries to persons or property; therefore, the Framers had no occasion to consider the effect of Article III, Section 18 on damages recoverable against the Commonwealth.

First, while the debates of the Constitutional Convention of 1874 and commentaries on that convention are interesting, they are irrelevant to an interpretation of a clear, unambiguous, mandatory, self-executing restraint on legislative power. This is one of the oldest Rules of Construction in the Commonwealth, having been stated and restated by this Court over and over again from 1825 to the present. In *Eakin v. Raub*, 12 Sergeant and Rawle 330 (1825), Justice Gibson noted that the Constitution contains whole will of the body from which it emanates and that the debates are of no value in determining that. See also, *Commonwealth v. Man*, 5 Watts and Sergeant 403 (1843).

Resort to the debates of the convention may show the views of the individual members and the reasons for their votes:

> [b]ut they give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safe to construe the Constitution from what appears upon its face. *Commonwealth v. Balph*, 111 Pa. 365, 3 A. 220 (1886); see also

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1. 42 Pa.C.S. §5533 (b) provides: Amounts recoverable — Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

County of Cumberland v. Boyd, 113 Pa. 52, 4 A. 346 (1886); *Commonwealth ex rel. Margiotti v. Lawrence*, 326 Pa. 526, 193 A. 46 (1937).

By Article III, Section 18, the people, in clear, unambiguous language, reserved unto themselves the right to obtain for injury sustained a remedy by due course of the law.

> The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part . . . A limitation of recovery to a sum less than the actual damage is palpably in conflict with the right to remedy by due course of law.

Passenger Railway Co. v. Boudrou, 92 Pa. 475 (1880).

No limitation or exception is contained by the language of the Section, except for Workmen's Compensation cases, and no other exception should be written into the Section by this Court.

Secondly, it is a mistake to assume that the Commonwealth was considered immune from suit because such a conclusion ignores history. Extensive legislation already existed in 1874 permitting suits against the Commonwealth and its subdivisions in eminent domain cases, for contract breaches, escheat matters, and other matters where the attorney general was authorized to represent the Commonwealth, without a limitation on the damages recoverable.

Third, the majority's interpretation of this Section could easily be read to protect only those actions which the Legislature or Constitutional Drafters were aware of in 1874. By implication, an application of this holding would permit the Legislature to limit damages in all public and private actions recognizable after

1874. Actions by or against women, product liability claims, malpractice cases, automobile accidents, nuclear power, gas, and electricity accidents, all unknown to the law in 1874, could be limited by such an interpretation.

I view this Section as a broad mandate by the people to the Legislature directing it not to meddle in the people's right to recover against those responsible for injuring them. Article III, Section 18 wiped clean all statutory enactments in conflict with it when the Section became part of the Constitution in 1874 and stands as a bulwark, *until the people otherwise direct*, against all present and future attempts by the Legislature to fritter away the rights of the people. We do a great disservice to the people, whose trust we have accepted, to interpret this Section in any way but in their favor.

Instead, this Court now lets stand, upon no rational basis, a damage limitation which creates a different measure of damages recoverable depending upon whether the tortfeasor is a private individual, a political subdivision, or the Commonwealth. Apart from this Equal Protection of the Laws violation, the damage limitation creates a fund apportionable among all victims of a single tortious episode whether they be one or one hundred or more. As applied to this very litigation, 72 injured parties will be forced to share an aggregate $500,000, which will be insultingly inadequate to compensate many of them for their losses. It is alleged that such a limit on damages is a reasonable exercise by the Legislature to prevent depletion of the public funds, but this argument was rejected in *Ayala* and *Mayle*. This view also ignores the reality that these undercompensated victims of catastrophic proportions will quickly exhaust their meager recovery and become charges upon the very Commonwealth that should have adequately compensated them in the first place. It is thus illusory to boast that a limitation of damages protects the public treasury.

The majority's present course is regrettable, because it ignores the duty entrusted to this Court of protecting rights reserved by the people, for the people, and instead creates rights

in favor of the creature of the people, at the expense of the people, who in actuality, are the only sovereign under our form of governemnt. Accordingly, I dissent.

MR. JUSTICE LARSEN joins this Dissenting Opinion.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

RUTH V. SMITH, Administratrix of the Estate of HARRY F. SMITH, Deceased, *et al.*	:	May Term, 1982
	:	No. 6409
vs.	:	(Supreme Court Nos. 70, 71, & 74
CITY OF PHILADELPHIA, *et al.*	:	Appeals Docket 1984)

OPINION
Sur Pa.R.App.P. 1925

Marutani, J. 26 June 1985

From the trial court's Order of April 3, 1984, granting plaintiffs'[1] motion for summary judgment and holding that "the $500,000.00 aggregate limitation on damages arising from the same occurrence in the Political Subdivision Tort Claims Act, Act of November 26, 1978, P.L. 1399, No. 330, formerly 53 P.S. § 5311.402, repealed by Act of October 5, 1980" as being unconstitutional, and entry of judgment thereon, two of the defendants — the City of Philadelphia and the Philadelphia Gas Works — have filed the instant appeals.

Background Summary

On May 11, 1979, a natural gas explosion erupted in a neighborhood known as "Bridesburg" in Philadelphia. As a result thereof there were 44 separate actions filed on behalf of 72 claimants, involving claims for injuries, seven deaths and extensive

1. There are 72 claimants. The instant motion for summary judgment was filed by three of these plaintiffs: Ruth V. Smith, Administratrix of the Estate of Harry F. Smith, Deceased; Rita Ladzensky, Administratrix of the Estate of Gerald Ladzensky, Deceased; and Charles Alexander Scott.

property damage.[2] Among the 72 claimants are the instant three plaintiffs in this proceeding who had filed an action for declaratory judgment [3] which resulted in this Court's order of April 3, 1984, quoted in part hereinabove.

It is not disputed that the liability of two defendants, City of Philadelphia and the Philadelphia Gas Works, comes within the provisions of the Political Subdivision Tort Claims Act ("Tort Claims Act"), including, in particular, the challenged provision limiting damages in the aggregate to no more than $500,000.00 "arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences . . . ." 42 Pa.C.S.A. § 8553.

Further, it is beyond cavil that the aggregate of the claims from this Bridesburg explosion far exceeds the $500,000.00 limitation: claims already paid by insurance companies, alone, total almost $214,000,00; and there are yet other property claims, numerous injuries, and seven deaths requiring accounting.

This Court concluded, as a matter of law, that the damage-limitation provision of the Tort Claims Act was unconstitutional in violation of (a) Article III, § 18 of the Pennsylvania Constitution and (b) the equal protection clauses of both the Fourteenth Amendment to the United States Constitution as well as Article III, § 32 of the Pennsylvania Constitution.

Discussion

1. *The Nature of the Interests Involved.*

At the outset, we must all remind ourselves of the fundamental interests that are involved and the process which would impinge upon those interests. Beginning with the Declaration of Independence, proclaimed on July 4, 1776 in this very city, our Founding Fathers declared for posterity that:

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2. There are no less than eight insurance companies which have filed suit as subrogees, their claims alone totalling almost $214,000.00. Complaints were filed by Firemen's Fund, General Accident, Harleysville, Lumbermen's Mutual, Providence, Ohio Casualty, Selected Risks, and West American.

3. A motion for summary judgment is available in a declaratory judgment proceeding. Pa. Public Utility Comm'n Bar Ass'n v. Thornburgh, 62 Pa.Cmwlth. 88, 434 A.2d 1327 (1981).

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty and the Pursuit of Happiness. . . .

Fifteen years later, in 1791, the Bill of Rights was adopted, and the sanctity of this trilogy — Life, Liberty and the Pursuit of Happiness — was variously fortified in the amendments to the United States Constitution. Thus —

> Fifth Amendment:
>
> No person shall . . . be deprived of his *life*, liberty, or *property*, without due process of law. (emphasis added)
>
> Ninth Amendment:
>
> . . . the enumeration in the Constitution, of *certain rights*, shall *not* be construed to *deny or disparage* others *retained by the people*. (emphasis added)
>
> Tenth Amendment:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved to* the States respectively, or *the people*. (emphasis added)

The same principles were reiterated in 1868 when the Fourteenth Amendment was ratified:

> . . . nor shall any State deprive any person of *life*, liberty or *property*, without due process of law. (emphasis added).

In short, the interests with which we are here concerned — life, property, pursuit of happiness of our citizenry — are not trivial; rather, they are basic and fundamental to the inhabitants of this Commonwealth and the commonweal. This basic concept was embedded into the Pennsylvania Constitution by clear and unequivocal language in Article I, § 11:

> All courts shall be open; and every man for injury done him in his *lands, goods, person or reputation shall have remedy by due course of law*, and right and justice administered without sale, denial or delay. (emphasis added).

These "inalienable Rights" first proclaimed in the Declaration of Independence were reconfirmed 104 years later by the Supreme Court of Pennsylvania, conserving

> the reserved right to every man, that for an injury done him in his person, he shall have remedy by due course of law. *The people have withheld power from the legislature* and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. *Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured him in the Declaration of Rights.*

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou, 92 Pa. 475, 481-82 (1880) (emphasis added).

To countenance, in whole or in part, any erosion of these "inalienable Rights" by the legislature was deemed equivalent to —

> abolishing the Declaration of Rights; *to do that the whole people of the commonwealth must be directly consulted and they must give assent*. For while the plain implication from the declaration is that the power to limit this indefeasible right rests solely with the people, yet when they adopted the constitution of 1874, with an extreme of caution they expressly said, 'Everything in this article is excepted out of the general powers of government and shall forever remain inviolate.' That is, *shall forever remain with the people; they will not trust their own legislature with power to minimize or fritter it away* . . . .

Erdman v. Mitchell, 207 Pa. 79, 92, 56 A. 327, 332 (1903) (emphasis added).

2. *The Import of Article III, § 18 of the Pennsylvania Constitution.*

Article III, § 18[4] placed the following prohibition upon the

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4. This provision was originally numbered Article III, § 21 when adopted in 1874; amended in 1915 to include the worker's compensation exception; in

legislature:

> [Other than workmen's compensation] in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property . . . .

This provision, adopted by the sober and ponderous process of a Constitutional amendment, involving in the process the entire citizenry of this Commonwealth, not only reaffirmed but also was a natural extension of the basic principle preserving certain rights reserved to the people.

In derogation of this unequivocal and clearly-expressed language, defendants point to that portion of Article I, § 11 of the Pennsylvania Constitution, reading:

> Suit may be brought against the Commonwealth in such *manner* and in such *courts* and in such *cases* as the Legislature may by law direct. (emphasis added).

It is contended that this provision, by its language, grants authority to the legislature to place an aggregate limit on damages as set forth in the Tort Claims Act.

Under this section 11, there are three permissible bases for enacting legislation governing lawsuits against the Commonwealth:[5] "manner . . . courts and . . . cases." Pointedly, there is no mention of "amount," a word not unknown to the Pennsylvania Constitution, as evidenced by its appearance elsewhere in Article III, § 18.

In the context of the issue of limitation of damages, we are not here concerned with either "courts" or "cases."[6] This leaves, then, the remaining basis, "manner."

1967, it was renumbered to its present designation.

For historical background of this section, see Singer v. Sheppard, 464 Pa. 387, 394, 346 A.2d 897, 900 (1975).

5. In this context, the term "Commonwealth" has been deemed to include political subdivisions: Carroll v. County of York, 496 Pa. 363, 366, 437 A.2d 394, 396 (1981).

6. Designation of "cases" is set forth in the Act of Oct. 5, 1980, P.L. 693, No. 142, § 221(1), 42 Pa.C.S.A. § 8522(b), with the express declaration that such is made pursuant to Article I, § 11 of the Pennsylvania Constitution.

Black's Law Dictionary (rev. 4th ed.) defines "manner":

> A way, mode, method of doing anything, or mode of proceeding in any case or situation.

Consistent with this meaning, the Pennsylvania legislature demonstrated the meaning of "manner." Under § 8522(b)(5) of the Act of 1980,[7] the legislature declared that the Commonwealth shall be liable for losses occasioned by "potholes . . . or similar conditions" but then directed the manner in which the plaintiff must proceed:

> [T]he claimant . . . must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

Thus, after listing the "cases" for which claims may be made against the Commonwealth, the legislature directed the "manner" in which a claim may be brought against the Commonwealth.

Palpably, "manner" is not, and cannot be, synonymous with the word "amount." Any contorted linguistic alchemy to transform the two into meaning the same can only emanate from the lips of some Lewis Carroll character from "Alice in Wonderland."

The purported exercise of legislative authority of fixing an aggregate limitation on damages cannot be sustained by the provisions of Article I, § 11. On the contrary, the clear and unequivocal prohibition contained in Article III, § 18, governs.

3. *The Doctrine of "Sovereign Immunity."*

The limitation-on-damages provision of the Tort Claims Act provides that:

> *Amount recoverable.*—Damages arising from the same cause of action or transaction or occurrence or series of

7. *Id.*

> causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

42 Pa.C.S.A. § 8553(b)

In holding this provision to be unconstitutional, it is not necessary to challenge the doctrine of sovereign immunity. There may be a temptation to rationalize that if the sovereign is empowered to deny *all* remedy against it, then it should be free to grant a remedy *with conditions* (in this instance, a dollar limitation) appended to it. Such a syllogistic leap attains levitation only by avoiding the gravity of analysis.

The differing impact between, on the one hand, denial altogether of any remedy, and, on the other hand, limiting recovery to a sum less than the actual damages suffered, has been given recognition by the Pennsylvania Supreme Court.[8] "Cause of action" has been defined in *Wilson v. Howard Johnson Restaurant*, 421 Pa. 455, 219 A.2d 676 (1966) as follows:

> It obviously means what this court in Martin v. Pittsburgh Rys. Co., 227 Pa. 18, 75 A. 837, said it meant, to wit: "The negligent act or acts *which occasioned the injury*, ...

Id. at 460, 219 A.2d at 679 (emphasis in original).

Thus *right* to a remedy or claim for cause of action is not to be confused with the *amount* of monetary relief to be accorded for such cause of action.

"Cause of action" and "amount of damages" are two, distinct precepts; they are not synonymous. The distinction is not to be blurred by syllogistic leaps from the springboard of the doctrine of "sovereign immunity."

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8. In Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897 (1975), the lead opinion by Chief Justice Jones acknowledged the principle that "[a] limitation of recovery to a sum less than actual damage, is palpably in conflict with the right to remedy by due course of law." 464 Pa. at 397, 346 A.2d at 902. In dicta, the Chief Justice then expressed the following:

> However, if the right to a remedy is *eliminated* by the legislature, this principle is not violated. Nothing in Article III, Section 18, prevents the abolition or modification of a *cause of action*.
>
> *Id.* (Emphasis added; citations omitted).

Compare dissenting opinion by Justice Manderino.

4. *Denial of Equal Protection of the Laws.*

The Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article III, § 32 of the Pennsylvania Constitution and the Fourteenth Amendment have been deemed to have "meaning and purpose sufficiently similar to warrant like treatment": *Laundenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 67, 436 A.2d 147, 155, n. 13 (1981).[9]

Unlike the formula for recovery under the No-fault Act which focused upon the *victim* for its base,[10] the formula for recovery under the Tort Claims Act focuses *solely upon the amount of recovery*, — fixing a dollar aggregate limitation per "cause of action or transaction or occurrence. . . ." 42 Pa.C.S.A. § 8553(b). Inherent in such a formula is the resulting unequal treatment of those who suffer losses through the negligence of the sovereign for which a cause of action exists. While numerous examples of inequality might be recited,[11] the gas explosion

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9. See also Article I, § 26 of the Pennsylvania Constitution which provides:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

10. Pennsylvania No-fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. § 1009.101 *et seq.*

In Singer v. Sheppard, *supra* note 8, the lead opinion described the recovery formula under the No-fault Act as follows:

> The effect of the No-fault Act is to create two classes of motor vehicle accident victims, each with different items of compensable damage. But in each class the types of losses, which are compensable, are compensable without limit.

464 Pa. at 396, 346 A.2d at 901 (footnote omitted).

11. Some examples may include the following: (a) If one of several victims who suffered a loss from the same occurrence reaches judgment first, may he recover his judgment in full up to $500,000.00? If so, what happens to the remaining victims? Must such judgment winner await until the last of the claimants has exhausted judicial relief, including appeals, before he may then "share" in the aggregate fund? (b) What if the representatives of the sovereign,

"occurrence" in the instant proceeding, involving 72 victims (including seven deaths), is illustrative of the unequal consequences inherent in the aggregate dollar limitation. Compounding their misfortune, each of the 72 victims' monetary recovery will be diluted by the happenstance that there are 71 other victims with claims founded upon the same occurrence. Yet a single victim in another incident involving identical losses or injuries would be eligible to recover far more, including full monetary redress if the loss did not exceed $500,000.00.

Having concluded that there is inherently unequal treatment in the application of this aggregate dollar limitation, we must next determine which of the three standards of judicial review is applicable to the issues in this case: "strict scrutiny" (involving a suspect classification or a fundamental right); "intermediate" standard of review (important but not fundamental rights, or sensitive classifications involved);[12] or the "rational relationship" test.

In *James v. Southeastern Pennsylvania Transportation Authority*, ____Pa. ____, 477 A.2d 1302 (1984), the question before the Supreme Court of Pennsylvania was whether a statutory requirement of a notice of a claim within six months from the date of accrual of the cause of action violated the Equal Protection

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or political subdivision, elect to enter into (reasonable) compromise settlements as to any one or more multiple claimants, thereby depleting the aggregate fund? Are such representatives barred from entering into settlements unless *all* claimants agree to an overall settlement? What if there should be a claimant whose demand for a share of the aggregate fund is such that an overall settlement is thwarted?

12. The intermediate standard has also been referred to as "heightened scrutiny." James v. Southeastern Pennsylvania Transportation Authority, ____ Pa. ____, ____477 A.2d 1302, 1306 (1984). In matters involving gender-based classifications, the intermediate standard has been identified as requiring a "substantial relationship" to an important governmental interest. Craig v. Boren, 429 U.S. 190 (1976), *reh. den.*, 429 U.S. 1124 (1977). In Mississippi University for Women v. Hogen, 458 U.S. 718 (1982), a case which also involved gender-based classification, the burden justifying such appears to have been made somewhat more stringent, namely that of showing an "exceedingly persuasive justification" for the classification. *Id.* at 725 (citing, *inter alia*, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

Clause. In weighing this issue, the majority applied the "intermediate or heightened scrutiny" standard of review,[13] declaring that:

> [Where a citizen's] important interest in access to the courts to sue the Commonwealth in cases where the Commonwealth has consented to suit has been restricted * * * an intermediate or heightened scrutiny standard of review is appropriate.

____Pa. at ____, 477 A.2d at 1306.

Our order in the instant proceeding was issued in the month preceding the decision in *James*.[14] We, too, applied the intermediate or heightened scrutiny standard of review, and concluded that the aggregate dollar limitation of the Tort Claims Act violated the Equal Protection Clauses of both the United States and Pennsylvania Constitutions.

Thereafter, however, an en banc court in *Lyles v. City of Philadelphia*, ____Pa. Cmwlth. ____, 490 A.2d 936 (1985), in considering the constitutionality of the $250,000.00 damage limitation contained in the Sovereign Immunity Act,[15] applied the lesser "rational relationship" standard of review. In electing to apply this standard, President Judge Crumlish wrote for the Court:

> Since the restriction imposed by Act 152 [Sovereign Immunity Act] neither creates a suspect classification nor burdens a fundamental right, but rather impacts on the economic right to full compensation, the appropriate level of scrutiny under the Equal Protection Clause is the rational relationship test.

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13. Justice Larsen, while dissenting from the result, concurred "that the standard of review applied by the majority in examining the challenged statute is a correct one." ____Pa. at ____, 477 A.2d at 1308. Justice Zappala would apply the "rational basis" test. Justice Hutchinson concurred in the result.

14. Our order was issued on April 3, 1984; the *James* decision was handed down on May 24, 1984.

15. The claim in *Lyles* arose in March 1979, and thus was governed by Act 152, 42 Pa.C.S.A. § 5111 which has been replaced by Act 142, 42 Pa.C.S.A. § 8528 containing a similar damage limitation.

____Pa. Cmwlth. at ____, 490 A.2d at 941. The Court then determined that the statutory provision limiting damages "rationally relates to the legitimate government interest in preserving sufficient funds for essential public services without imposing an undue burden upon taxpayers." *Id.*

We shall not here engage in sophistry to attempt to distinguish the provisions of the Sovereign Immunity Act (applicable to the Commonwealth) from the provisions of the Tort Claims Act (applicable to political subdivisions);[16] rather we shall directly approach the issue as one involving conflicting results between the Commonwealth Court's decision and our earlier ruling. Inasmuch as our ruling is presently on appeal to the Supreme Court, we shall, with all due respect to the Commonwealth Court, set forth the bases for our decision.

As recited at the outset of this opinion, the interests with which we are here concerned — "life, liberty [and] property" as reiterated in the Fourteenth Amendment — are basic and fundamental to the welfare of the citizenry. Where statutory restrictions bear upon such interests, the Supreme Court of Pennsylvania has ruled that "heightened scrutiny" is the applicable standard of review: *See James, supra*.

The narrow question presented is whether different standards of review are to be applied in these two situations — one involving *access* to the court (*James, supra*) and the other involving *relief* to be granted (*Lyles, supra*). We had concluded in the negative. If an aggrieved claimant's rights are to be protected by the heightened scrutiny standard of review so that he is not to be readily barred from *seeking* relief, but once he gains entry he is *denied* relief, in whole or in part, by application of the lesser

16. The Sovereign Immunity Act contains two dollar limitations: one applicable to the individual claimant ($250,000) and the other an aggregate ($1,000,000) to the occurrence. The Tort Claims Act contains a single dollar limitation applicable, jointly, to the individual and to the occurrence. Thus, two claimants with similar injuries and losses — one with a claim against the Commonwealth and the other against a political subdivision — may result in one recovering double the limit that the other recovered. Or from the perspective of the political subdivision: a political subdivision may be called upon to pay double the amount that the Commonwealth may be called upon for identical injuries and losses.

standard of rational relationship — the more protective scrutiny is rendered hollow. Safeguarding of the right to access can thereby be diluted — in a capricious manner, as will be discussed below — or rendered almost meaningless.

The application of the heightened scrutiny test was fully and carefully outlined in *James* by Justice Flaherty:

> The standard of review is characterized by the following techniques: (1) requiring that the governmental interest asserted be an important one, though not "compelling" as required in a strict scrutiny review . . .; (2) requiring that the governmental classification be drawn so as to be closely related to the objectives of the legislation . . .; (3) requiring that a person excluded from enjoyment of an important right or benefit because of his membership in a class be permitted to challenge the denial on the grounds that his *particular* denial would not further the governmental purpose of the legislation.

____Pa. at ____, 477 A.2d at 1307 (citations and footnote omitted; emphasis in original).

The governmental interest sought to be sustained in placing an aggregate dollar limitation has been declared to be to "preserv[e] sufficient funds for essential public services without imposing an undue burden upon taxpayers." *Lyles, supra*. ____Pa. Cmwlth. at ____, 490 A.2d at 941 (applying the "rational relationship" test). It cannot be gainsaid that such purpose is an important governmental objective. However, while public funds are preserved and undue burdens on the taxpayer are avoided, another segment of the citizenry is being called upon to shoulder the burdens — by denial of just compensation for the loss of their lives, properties and well-being. The "undue burden" of which the unscathed taxpayers are spared does not, thereby, magically disappear; it is borne by the aggrieved claimants.

The Tort Claims Act, by focusing solely upon *fiscal* considerations, and *failing to address the varying situations of victims*, either as to numbers affected or as to severity of injuries and property losses, does not even pretend to meet the second criterion of *James*, namely, that "the government classification be

drawn so as to be closely related to the objectives of the legislation." The Tort Claims Act sets forth *no classification whatsoever*. Any "classification" comes about, literally and figuratively, by accident — mere happenstance of the number of co-victims in the same occurrence, the severity of their injuries and property losses, and other variables.

The aggregate dollar limitation also presents deficiencies when measured by the third criterion of *James*, namely —

> requiring that a person excluded from enjoyment of an important right or benefit because of his membership in a class be permitted to challenge the denial on the grounds that his *particular* denial would not further the governmental purpose of the legislation.

____Pa. at ____, 477 A.2d 1307 (emphasis in original).

In passing, it may be noted that this aggrieved claimant who is placed within the operation of the Tort Claims Act is, of course, given no choice or control as to either "class" membership or the size of his class — that is, the number of co-victims with whom he must share a single statutorily-limited fund. Under such circumstances, whether an aggrieved claimant comes within the third criterion enunciated in *James* would change according to whether he is a sole claimant or one of few claimants with comparatively modest claims or, on the other hand, among one of many seriously aggrieved claimants — as in the case *sub judice*. Thus, in theory, the same claimant could be damaged identically in two different occurrences, both involving a political subdivision as the tortfeasor — and yet in one instance unable to seek invocation of the third criterion of *James*, i.e. challenge the statutory limitation.

CONCLUSIONS

1. The injuries and property losses for which redress is sought in this incident involve basic and fundamental rights. These include loss of "life," deprivation of "property," and, for a number of the victims who suffered personal injuries, denial of

the "pursuit of happiness." While some may dismiss such articulation as trite, such cavalier dismissal does not erase these basic rights which have long been embedded in the Declaration of Independence, the United States Constitution, and the Pennsylvania Constitution.

2. Article III, § 18 of the Pennsylvania Constitution expressly prohibits the General Assembly from "limit[ing] the amount to be recovered for injuries resulting in death, or for injuries to persons or property. . . ." The only exception is workers' compensation, and none other.

3. Article I, § 11 of the Pennsylvania Constitution empowers the General Assembly to legislate only as to "manner . . . courts and cases." Pointedly, this provision makes no mention of "amount," as appears in Article III, § 18. In the context of the issue of limitation of damages, neither the word "courts" nor "cases" can support legislation limiting damages. The remaining word — "manner" — may not, under any fair reading, be construed to encompass "amount." Indeed, under the Tort Claims Act itself, 42 Pa.C.S.A. § 8522(b)(5), the General Assembly demonstrated its understanding of the "manner" in which "cases" may be brought against the political subdivision.

Thus, even aside from any issue of denial of Equal Protection, the Tort Claims Act, insofar as its aggregate damage limitation provision is concerned, is unconstitutional.

4. The doctrine of "sovereign immunity" — the power to withhold the *right* to any remedy against the sovereign — is not to be confused with the asserted power to limit the *amount* of monetary relief, once the immunity is removed. This distinction was recognized and articulated by the Supreme Court of Pennsylvania in *Singer v. Sheppard*, 464 Pa. 387, 397, 346 A.2d 897, 902 (1975). "Cases" (cause of action) and "amount" (damages) are not synonymous terms; they are not be blurred by the use of the rubric 'sovereign immunity."

5. Inherent in the aggregate dollar limitation per "occurrence" contained in the Tort Claims Act, 42 Pa.C.S.A. § 8553(b), are the ingredients for inevitable unequal treatment of aggrieved claimants. The extent of monetary recovery for any particular claimant can and will vary by the happenstance of,

among other factors, the number of co-victims involved in that same occurrence, the extent of injuries and losses incurred by each, and whether the single limited fund has been depleted when such claimant seeks ultimate payment. Yet, another citizen with identical losses or injuries, in a different but identical incident, may well recover a greater sum, if fewer victims with lesser losses or injuries were involved. Such a statutory impact constitutes denial of Equal Protection.

6. In weighing the constitutionality of the denial of Equal Protection, the standard of review is "intermediate or heightened scrutiny." *James v. Southeastern Pennsylvania Transportation Authority*, ____Pa. ____, 477 A.2d 1302 (1984). *Contra*, *Lyles v. City of Philadelphia*, ____Pa. Cmwlth. ____, 490 A.2d 936 (1985). Three criteria are to be considered in applying the test: (a) whether the governmental interest is an important one; (b) whether the classification be drawn so as to be closely related to the objectives of the legislation; and (c) whether the person excluded from enjoyment of an important right or benefit because of membership in a class, is permitted to challenge the denial on the grounds that his *particular* denial would not further the governmental purpose of the legislation. *James*, *supra*.

7. The damage limitation provision of the Tort Claims Act fails to satisfy the three criteria of *James*. While preservation of fiscal flexibility may be a worthy governmental purpose, where injured victims are being called upon to subsidize such goal, the municipal subdivision must demonstrate something more than merely the goal of "preserving sufficient funds for public services." Moreover, the Act sets forth no "classification" or other criterion in relation to either the objectives of the legislation or whether a particular claimant would, or would not, be permitted to challenge the damage limitation vis-a-vis "his *particular* denial" of relief.

Accordingly, on either or both bases — namely, the Act being in violation of Article III, § 18 of the Pennsylvania Constitution, or being in violation of Equal Protection guarantees — the provision of the Tort Claims Act limiting "[d]amages arising from the same cause of action or transaction or occurrence or

series of causes of action or transactions or occurrences. . . [to] $500,000 in the aggregate" must be struck down as being unconstitutional.

William M. Marutani, J.

Supreme Court of Pennsylvania
Eastern District

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, Appellee	:	No. 70, 71 and 74 E.D. Appeal Docket 1984
v.	:	
CITY OF PHILADELPHIA	:	
v.	:	
PHILADELPHIA GAS WORKS	:	
v.	:	
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the Court of Common Pleas, Philadelphia County, be and the same is hereby reversed.

BY THE COURT:

Marlene F. Lachman, Esq.
Prothonotary

Dated: October 3, 1986

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellants*	:	Nos. 70, 71 & 74 Appeal Docket 1984
v.	:	
CITY OF PHILADELPHIA	:	
and	:	
PHILADELPHIA GAS WORKS	:	
and	:	
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION, *Appellees*	:	

NOTICE OF APPEAL

Notice is hereby given that Ruth V. Smith, Administratrix of the Estate of Harry F. Smith, Deceased and Rita Ladzensky, Administratrix of the Estate of Gerald Ladzensky, Deceased and Charles Alexander Scott, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final Order of the Pennsylvania Supreme Court, entered in this action on October 3, 1986.

This appeal is taken pursuant to 28 USC §1257(2).

Dated December 24, 1986.

David F. Binder, Esquire
RAYNES, McCARTY, BINDER, ROSS & MUNDY
1845 Walnut Street, Suite 2000
Philadelphia, PA 19103
215/568-6190
Attorneys for Appellant Ruth V. Smith

Theodore A. Schwartz, Esquire
M. MARK MENDEL, LTD.
Attorneys for Appellant Charles Alexander Scott

Jerome Gamburg, Esquire
Attorney for Appellant Rita Ladzensky

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RUTH V. SMITH, ADMINISTRATRIX OF THE ESTATE OF HARRY F. SMITH, Deceased and RITA LADZENSKY, ADMINISTRATRIX OF THE ESTATE OF GERALD LADZENSKY, Deceased and CHARLES ALEXANDER SCOTT, *Appellants*	:	Nos. 70, 71 & 74 Appeal Docket 1984
v.	:	
CITY OF PHILADELPHIA	:	
and	:	
PHILADELPHIA GAS WORKS	:	
and	:	
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION, *Appellees*	:	

CERTIFICATION OF SERVICE

David F. Binder, Esquire, counsel for appellants, hereby certifies that copies of the attached Notice of Appeal were served on the following parties by placing same in the United States mails, first class, postage pre-paid on December 24, 1986:

Brian E. Appel, Esquire
First Deputy City Solicitor
1500 MSB
Philadelphia, PA 19102-1692
Attorney for City of Philadelphia

Ruth Rudberg Wessel, Esquire
Obermayer, Rebmann, Maxwell & Hippel
14th Floor, Packard Building
15th & Chestnut Streets
Philadelphia, PA 19102
Attorneys for Philadelphia Gas Works and Philadelphia Facilities Management Corporation

Thomas M. Crowley, Esquire
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

David F. Binder
Attorney for Appellant
Ruth V. Smith

ACTIONS AGAINST LOCAL PARTIES, 42 Pa.C.S. §§8541 and 8553
(POLITICAL SUBDIVISION TORT CLAIMS ACT)

§8541. Governmental immunity generally

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

§8553. Limitations on damages

(a) **General rule.**—Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

(b) **Amounts recoverable.**—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

(c) **Types of losses recognized.**—Damages shall be recoverable only for:

(1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering in the following instances:

(i) death; or

(ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of $1,500.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

(4) Loss of consortium.

(5) Loss of support.

(6) Property losses.

Insurance benefits.—If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

Supreme Court, U.S.
FILED
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CLERK

No. 86-1122

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix of the Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of the Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,
Appellants

v.

CITY OF PHILADELPHIA
and
PHILADELPHIA GAS WORKS
and
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION,
Appellees

On appeal from the Order of the Supreme Court of Pennsylvania, reversing the Order of the Court of Common Pleas of Philadelphia County, entering a declaratory judgment as to a single question at issue between the parties in the underlying and currently pending litigation

MOTION TO DISMISS OR AFFIRM

BRIAN E. APPEL*
First Deputy City Solicitor

CITY OF PHILADELPHIA,
Law Department
15th Floor
Municipal Services Bldg.
Philadelphia, PA 19102
(215) 686-3246

*Counsel of Record

HANDSEL B. MINYARD
City Solicitor

NORMA S. WEAVER
Chief Deputy in Charge of Claims

BARBARA R. AXELROD
Divisional Deputy in Charge of Appeals

Attorneys for Appellee City of Philadelphia

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the references identified in Appellants' Jurisdictional Statement:

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, Section 11 of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Article III, Section 32 of the Pennsylvania Constitution (its "equal protection" clause) provides in relevant part:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.

COUNTER-STATEMENT OF THE CASE

Following an underground gas explosion on May 11, 1979, forty-four state tort actions were filed against the City of Philadelphia ("the City"), the Philadelphia Gas Works ("PGW"), its management corporation, and one private property owner. Those actions were assigned to a single judge for orderly disposition.

The City and PGW pled, among other affirmative defenses, the Political Subdivision Tort Claims Act[1] ("the Act"). The Act provides for governmental immunity as the general rule, but creates a waiver with respect to eight areas of activity.[2] It also provides for the waiver to be limited to $500,000 per occurrence.[3]

While the tort actions were pending, three of the claimants filed a joint declaratory judgment action, which was assigned to the same judge. The purpose of the declaratory judgment action was to collaterally challenge the limited waiver provision on state and federal constitutional grounds. The claimants argued that settlement of their claims was impossible without this legal determination.

The City moved to dismiss the action, pointing out that the Declaratory Judgments Act[4] is not available to secure advisory opinions — in this case, an opinion regarding the validity of an affirmative defense which might or might not be reached in a currently pending action. It also pointed out that a contrary construction of the Declaratory Judgments Act (a uniform act) would only spawn piecemeal litigation. The trial court initially

1. Act of November 26, 1978, P.L. 1399, No. 330, §101 *et seq.*, 53 P.S. §5311.101 *et seq.* The Act was subsequently codified, without substantial change, at Subchapter C of the Judicial Code by the Act of October 5, 1980, P.L. 693, No. 142, §221(1), 42 Pa. C.S.A. §§8541-8564 *et seq.*

2. 53 P.S. §5311.202(b)(1) — (8).

3. 53 P.S. §5311.402

4. Act of July 9, 1976, P.L. 386, No. 142, §2, 42 Pa. C.S.A. §§7531-41.

agreed and dismissed the complaint, but then reversed itself.

Plaintiffs moved for summary judgment, contending that Article III, Section 18 of the Pennsylvania Constitution prohibits all damage limitations and, secondarily, that the $500,000 provision violated the equal protection guarantees of Article III, §32 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. The City opposed the motion for the reasons that had been set forth in its motion to dismiss, there being many factual issues remaining, and on substantive grounds.

The trial court, in granting the plaintiffs' motion, did not discuss the propriety of plaintiffs' reliance on the Declaratory Judgments Act or the validity of their claim that there were no factual issues remaining. The court held that both Article III, Section 18 of the Pennsylvania Constitution and the equal protection guarantees of the Pennsylvania and United States Constitutions had been violated. It did not treat the federal aspect of the equal protection claim separately. Indeed, both the standard to be applied in reviewing such a claim and the basis for the court's conclusion were discussed exclusively with reference to state court decisions. (The opinion is reproduced in Appellant's Jurisdictional Statement, page B-1.)

On appeal, the Supreme Court of Pennsylvania reversed, holding that Article I, Section 11 of the Pennsylvania Constitution, which expressly allows the state legislature to regulate governmental liability, created an exception to the general prohibition of Article III, Section 18 against damage limitations. The court also held that since Article I, Section 11 guarantees access to the courts to sue the government in cases where it has consented to suit, equal protection analysis under the Pennsylvania Constitution requires the application of the intermediate or heightened standard of review. Applying

that standard, the court found that the $500,000 provision is closely related to the important governmental interest of preserving the public treasury against the possibility of unusually large recoveries in tort cases and upheld it. It did not treat separately the federal equal protection claim, as to which the more lenient rational relationship test would have applied.

The Court noted that the City had objected to its assumption of jurisdiction in order to decide in advance the constitutionality of an affirmative defense raised in pending litigation.[5] Implicitly conceding that the City's objections were meritorious, it explained that "in the interests of judicial economy," it would address the merits of the constitutional questions presented.[6]

MOTION TO DISMISS

I. THE ORDER APPEALED FROM WAS NOT A FINAL JUDGMENT

In order for a judgment of an appellate court to be final and reviewable for purposes of 28 U.S.C. §1257, "it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' " *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1946). Thus, the requirement of finality has not been met even where, unlike here, "the major issues in a case have been decided and only a few loose ends remain to be tied up — for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

5. Opinion of the Pennsylvania Supreme Court, footnote 1.

6. The other objection reiterated by the City on appeal, upon which the court did not comment, was that summary judgment should not have been granted because a multiplicity of factual issues remained to be decided.

The declaration by the Pennsylvania Supreme Court that the $500,000 limitation provision is constitutional did not end the litigation between the parties. Liability has yet to be determined, as does the amount of damages to be awarded each plaintiff should the liability issues be determined in plaintiffs' favor. There has been no verdict, let alone an entry of judgment.

The trial may well have a significant effect on the continued vitality of the federal constitutional question. It may be that the local governmental defendants will ultimately be found not liable. It may be that a non-governmental defendant will be found liable and will make up the deficit, if any, between the verdicts and $500,000. It is the very uncertainty of the outcome of any underlying litigation that caused this court to declare in *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Ass'n.*, 276 U.S. 71 (1928):

> This court has no jurisdiction to review a mere declaratory judgment.

The finality requirement serves sound considerations of jurisprudence. It avoids the piecemeal review of state court decisions that would inevitably occur were this court to review declaratory judgments involving each issue which may or may not dispose of currently pending litigation. It avoids giving advisory opinions in cases such as this, where there is no real "case" or "controversy" within the meaning of Article III. Finally, it avoids unnecessary federal intrusion in state affairs. *See North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

This last purpose is particularly important here. The scope of state and local governmental immunity from tort actions recognized under the laws of the several states has traditionally been left to the states to decide. Nothing in the United States Constitution purports to delegate to the United States the authority to control state governmental tort liability. That power is reserved to the states

themselves through the 10th Amendment to the United States Constitution.

While plaintiffs may not find the decisions of the Pennsylvania General Assembly[7] and the Supreme Court of Pennsylvania to their liking, these matters are for the people of the Commonwealth of Pennsylvania to decide. Their choices should not be disturbed.

II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE PENNSYLVANIA SUPREME COURT DID NOT NEED TO DECIDE THE FEDERAL ISSUE IN ORDER TO DISPOSE OF THIS CASE

To be able to appeal to this court, plaintiffs must show not only that a federal question was presented to the highest court of the state having jurisdiction, but that its decision of that federal question was necessary for the determination of the case. *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937). That is not the case here and plaintiffs do not contend otherwise.

The Equal Protection Clause of the Pennsylvania Constitution, unlike that of the United States Constitution, has been construed to require application of the intermediate standard of review, or heightened scrutiny, where the challenged statutory enactment affects a would-be litigant's interest in recovery from the government. The challenged enactment obviously would pass scrutiny under the rational basis standard employed in federal constitutional analysis if it passed scrutiny under the stricter Pennsylvania standard. Therefore, the Pennsylvania Supreme Court did not treat the federal constitutional issue separately. It relied exclusively on Pennsylvania precedent, and ruled that the $500,000

7. The enactment challenged here grew out of a serious, exhaustive study, *Sovereign Immunity*, published in May, 1978 by the Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania.

provision satisfied the intermediate standard of scrutiny applicable under the Pennsylvania Constitution. Any decision of the federal question was unnecessary, as explained more fully below.

In reviewing legislation under the Equal Protection Clause of the Fourteenth Amendment, this court has traditionally applied the rational relationship test in the area of economic legislation aimed at achieving a reasonable balance between society's interest in the fiscal stability of government and a private litigant's interest in monetary recovery. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), reh. denied 398 U.S. 914 (1970). That standard was applied specifically to a review of federal legislation restricting tort liability, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 93-94 (1978). This court held that the Price-Anderson Act, which imposes a limitation on liability for nuclear accidents resulting from the operation of privately owned nuclear power plants, did not violate equal protection guarantees. The "general rationality" of the Act was said to justify the limitation. *Id.*

Similarly, our sister state appellate courts have applied the rational basis test in reviewing federal equal protection challenges to statutory provisions creating waivers of governmental immunity up to certain amounts.[8] That standard was not applied here.

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8. *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981); *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Seifert v. Standard Paving Co.*, 64 Ill. 2d 109, 355 N.E. 2d 537 (1976); *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1971); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704, *appeal dismissed*, 445 U.S. 921 (1980); *Crowe v. John W. Harton Memorial Hospital*, 579 S.W. 2d 888 (Tenn. App. 1979); *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 293 N.W. 2d 504, *cert. denied*, 449 U.S. 1035 (1980). As to waivers limited to certain areas of activity: *Bonds v. State of California ex rel. California Highway Patrol*, 187 Cal. Reptr. 792, 138 Cal. App. 3d 314 (1982); *Anderson v. City of Detroit*, 54 Mich. App. 496, 221 N.W. 2d 168 (1974); *Green-Glo Turf Farms v. State*, 347

Noting that Article I, Section 11 of the Pennsylvania Constitution provides that suits may be brought against the government "in such manner, in such courts and in such cases as the Legislature may by law direct," the Pennsylvania Supreme Court had previously declared that the Pennsylvania Constitution elevates a party's interest in access to the courts in order to sue the government to the level of an "important interest." *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984). Therefore, analysis of an equal protection claim asserted under the Pennsylvania Constitution requires the application of an intermediate or heightened standard of review, where the challenged legislation adversely affects a party's interest in suing the government. *Id.* Citing *James*, the Pennsylvania Supreme Court declared that the intermediate or heightened standard was applicable here, where the challenged legislation restricted the amount of money recoverable from the government in state tort actions.

The court concluded that the $500,000 provision withstood heightened scrutiny since it was closely related to the important governmental interest it was intended to serve: preserving the public treasury against usually large recoveries in tort cases, such as those sought by the claimants here. Since the provision clearly would have withstood more relaxed scrutiny under the Fourteenth Amendment, there was no need for the court to engage in federal constitutional analysis.

N.W. 2d 491 (Minn. 1984); *Winston v. Reorganized School District R-2*, 636 S.W. 2d 324 (Mo. 1982); *Garcia v. Albuquerque Public School Board*, 95 N.M. 391, 622 P.2d 699 (1981); *Pangburn v. Saad*, 326 S.E. 2d 365, 73 N.C. App. 336 (1985); *Paulson v. County of Washington*, 99 Wash. 2d 645, 664 P.2d 202 (1983), *appeal dismissed*, 464 U.S. 957 (1983); *Cords v. State*, 62 Wis. 2d 42, 214 N.W. 2d 405 (1974).

III. STATE SUBSTANTIVE GROUNDS WERE CONTROLLING

In addition to showing that decision of the federal question was necessary for the determination of the case, plaintiffs must demonstrate that the federal question was controlling. Equal reliance on federal and state substantive grounds precludes United States Supreme Court review of the federal ground. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965). As explained in Part II, *supra*, the Supreme Court of Pennsylvania relied on the fact that the $500,000 provision withstood the more intense equal protection scrutiny of the Pennsylvania Constitution. Its reliance on the state substantive ground was not merely equal, as in *Jankovich*, but controlling. Accordingly, Supreme Court review of the federal equal protection claim is precluded.

IV THIS COURT IS NOT EMPOWERED TO RENDER THE ADVISORY OPINION PLAINTIFFS SEEK

Article III of the Constitution restricts this Court to determining only an actual case or controversy. For a declaratory judgment to issue, there must be a dispute which calls for "an adjudication of *present* right upon *established* facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937); rehearing denied 300 U.S. 687 (1937).[9] *Accord, Ashcraft v. Mattis*, 431 U.S. 171, 172

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9. Thus, state courts have consistently refused to construe the Uniform Declaratory Judgments Act, pursuant to which this matter was initiated, to allow for an adjudication in advance of an affirmative defense raised in a currently pending and unresolved action. *See Boyett v. Boyett*, 269 Ark. 36, 38, 585 S.W. 2d 86 (1980); *Volkswagenwerk A.G. v. Watson*, 181 Ind. App. 155, 159, 390 N.E. 2d 1082 (1979) (declaratory judgment proceeding not available to test validity of affirmative defense raised in products liability action); *Eastern Fine Paper, Inc. v. Carriage Trade Co. Inc.*, 457 A.2d 1111 (Me. 1983); *Samuels Pharmacy, Inc. v. Board of Registration in Pharmacy*, 390 Mass. 583, 458 N.E. 2d 728 (1983) (declaratory

(1977), rehearing denied, 433 U.S. 915 (1977). (Emphasis supplied). No "present right" of the plaintiffs is at stake here, nor has a single fact been "established." They do not presently have a right to recover anything from the governmental defendants, let alone monies in excess of $500,000. They also have not yet established that they will be unable to recover against the non-governmental defendants.

What plaintiffs seek, in reality, is a declaration that (1) should they prevail on their claims against the governmental defendants, (2) should the amounts awarded exceed $500,000, and (3) should the plaintiffs be unable to collect from any non-governmental defendants, *then* they will be able to recover unlimited amounts from the governmental defendants. This court is not empowered to issue such a declaration.

V. THERE IS NOT A SUBSTANTIAL FEDERAL QUESTION PRESENTED.

The power to regulate state tort liability in general and the immunity of the state and its political subdivisions from such liability in particular is reserved to the states through the Tenth Amendment to the United States Constitution. Although this court has had the opportunity to pass on similar issues in the past, it has consistently refused to do so. An application for a writ of certiorari was denied in *Sambs v. City of Brookfield, supra,* which involved a federal equal protection challenge to Wisconsin's $25,000 limitation on recovery from

judgment proceeding not available to restrain board from using allegedly illegally seized evidence in pending disciplinary proceedings; *A.S. Abell Co. v. Sweeney*, 274 Md. 715, 337 A.2d 77 (1975). Indeed, in *Commonwealth Department of General Services v. Frank Briscoe Co.*, 502 Pa. 449, 459, 466 A.2d 1336 (1983), the Pennsylvania Supreme Court itself declared that a declaratory judgment proceedings is not available to determine "in advance the validity of an affirmative distinguish" raised in a currently pending action. The Court did not distinguish or cite *Briscoe* in the instant case.

municipal governments. Plaintiffs' appeal was dismissed in *Estate of Cargill v. City of Rochester, supra,* which arose out of a federal equal protection challenge to New York's similar $50,000 limitation.

Plaintiffs advance two reasons why they believe a substantial federal question to exist. The first reason is that they believe the $500,000 provision to be "unjust." However, the wisdom or fairness of legislation is not a judicial issue in the first instance, let alone an issue of federal constitutional dimension. It is for the legislature, and not the courts, to weigh questions of fairness. *Dandridge v. Williams,* 397 U.S. 471, 484-485 (1970), reh. denied 398 U.S. 914 (1970).

The second reason plaintiffs advance is that the Pennsylvania Supreme Court's anaylsis of the equal protection issue did not track this court's analysis of the due process issue in *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra.* Why it should have done so plaintiffs fail to explain. The only analysis in *Duke Power* at all relevant to this case is the equal protection analysis. However, as explained in Part II, *supra,* the Pennsylvania Supreme Court elected to apply the more stringent heightened standard of review applicable to Pennsylvania constitutional analysis, rather the rational relationship test applicable to federal constitutional analysis and used by this court in *Duke Power.*

Even more important, the fact that a substantial federal question was presented in *Duke Power* does not mean that one exists here. *Duke Power* involved the ruling by a federal district court that a federal statute purporting to limit the recovery available against private nuclear power plant operators violated the federal constitutional guarantee of due process. This case involves an act of the Pennsylvania General Assembly, not the United States Congress, and a ruling that the challenged provision does not violate the more stringent state equal protection standard. It must also be recognized that the $500,000 provision merely creates a limited waiver of the

government's immunity from tort liability and that the Tenth Amendment to the United States Constitution reserves to the states the power to regulate tort liability in general and the liability of the states and their political subdivisions in particular.

MOTION TO AFFIRM

This Court should affirm the order of the Pennsylvania Supreme Court both because the federal question plaintiffs seek to raise is insubstantial (*see* Part V, *supra*) and because the $500,000 provision is rationally related to its intended goal. The purpose of that provision, as noted by the Supreme Court of Pennsylvania, is to protect the public treasury and allow for risk management at the local level. *Carroll v. County of York,* 496 Pa. 363, 369, 437 A.2d 398 (1981).

To the same effect, Pennsylvania's intermediate appellate court commented:

> A balance must be struck between unlimited potential liability and the need for fiscal security. Full monetary responsibility for the tortious conduct of its agencies and employees involves the risk of an intolerable tax burden. . .

Picariello v. Commonwealth, 54 Pa. Cmwlth. 250, 256-257, 421 A.2d 477 (1980). The same conclusion has been reached in Pennsylvania's sister jurisdictions.

Indeed, far lower limitations on damage recovery have uniformly been upheld. *Jetton v. Jacksonville Electric Authority,* 399 So. 2d 396 (Fla. 1981) (Florida's $50,000 per person/$100,000 per incident limitation is rational because it "permit[s] governmental units to order their fiscal planning"); *Leliefeld v. Johnson, supra* (Idaho's $100,000 per person/$300,000 per incident limitation upheld); *Estate of Cargill v. City of Rochester, supra* (New York may legitimately limit the tort liability of its political subdivisions to $50,000 per claim because

"there are real and vital differences between the situations of governmental units and of private parties as potential tort defendants"); *Crowe v. John W. Harton Memorial Hospital, supra* (Tennessee's $20,000 limitation upheld); *State v. Silva, supra* (Wisconsin's $25,000 per person limitation on recovery from municipal governments upheld). Plaintiffs' claim that Pennsylvania's $500,000 per incident provision is the first to be upheld and therefore "sets a . . . precedent for other states to follow" clearly is unfounded.

While plaintiffs claim that the $500,000 provision is "unfair," that is not a basis for raising a federal constitutional challenge. It is not for our courts to question the wisdom of an act of the legislature. As the Wisconsin Supreme Court observed in rejecting a similar equal protection challenge to a $25,000 limitation on recovery:

> It is the *Legislature's* function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability and costs of insurance, and the financial condition of the governmental units.

Sambs v. City of Brookfield, supra, 293 N.W. 2d at 511. Significantly, this court refused plaintiffs' application for a writ of certiorari in that case.

The Wisconsin Supreme Court also observed that the government's needs for damage limitations were legitimate, given the activities in which it is required to engage:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a larger number of people. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks,

> beaches, and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government may range from a few dollars to a few million dollars.
>
> . . . [U]nlimited recovery to all victims may impair the ability of government to govern efficiently.

Id. For the same reasons, the Pennsylvania Supreme Court declared in this case (Opinion at p. A-8) that "preservation of the public treasury against the possibility of unusually large recoveries in tort cases, is, self-evidently, an important governmental interest."

The only case plaintiffs rely upon to the contrary, *White v. Montana,* 661 P.2d 1272 (Mont. 1983), a 4-3 decision, involved not a challenge to limitation on governmental tort liability, but a challenge to a prohibition against recovery for non-economic harm. Nothing in *White* suggests that there is a right to unlimited recovery from the government. Indeed, following *White,* the Montana legislature reenacted the same statutory provision, adding only the right to recover for non-economic losses up to the same amount to which they could recover for economic losses.

In conjunction with their claim that the $500,000 provision is "unfair," plaintiffs contend that it was "plainly, palpably and unequivocally" intended to serve a second goal of allowing for substantial recovery from the government and is unconstitutional because their individual recoveries will not be as substantial as they would have liked. Like Lady Macbeth, they protest too much. Their extravagantly worded claim regarding a secondary purpose is not followed by a single citation to case law or the legislative history of the Act. Perhaps that is because the Pennsylvania Supreme Court declared that the provision had but one purpose: the "preservation of the public treasury against the possibility of unusually large recoveries in tort cases." (A-8) The drafters of the Act

were concerned not with assuring putative litigants substantial amounts of money, but with alleviating governmental tort liability.

Next, plaintiffs claim that the $500,000 provision has not been uniformly applied. That claim is neither supported by the record nor properly before this court. At the trial level, plaintiffs limited themselves to a facial attack on the provision. They did not introduce any evidence regarding its application. When they attempted to raise the MOVE disaster payment for the first time during oral argument before the Supreme Court, they were told that that discussion was not properly before the Court. In any event, the MOVE situation, unlike this gas explosion, involved federal civil rights claims which cannot be subject to state legislative control or limitation.

As another adjunct of their claim that the $500,000 limitation is "unfair," plaintiffs assert that the jurist to whom their claims have been assigned will allow the fund to be depleted by the first claimant whose case is tried. That claim is speculative at best. At worst, it evinces an unsupported lack of faith in the integrity of the court. Insurance policy proceeds frequently are distributed among multiple claimants. There is no reason to believe that an orderly and proportionate dispersal of the fund will not occur. In any event, that issue is not presently before this court.

Plaintiffs assert, lastly, that this case must be reviewed because it is inconsistent with *Duke Power Co. v. Carolina Environmental Study Group Inc., supra.* That assertion is meritless. First, *Duke Power Co.* involved federal legislation. The only questions before this court were federal questions; to wit, whether the limitation on damages imposed by the Price-Anderson Act in favor of private nuclear power plant operators was violative of the Due Process Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment. This case, in contrast, involves state legislation. The only questions resolved by the Pennsylvania Supreme Court

were questions of state constitutional law. The federal jurisdictional basis so clearly present in *Duke Power Co.* is entirely absent here. This case should not be reviewed because there is no jurisdictional basis for doing so.

Second, *Duke Power Co.* involved a limitation on recovery from private parties. Nothing in the United States Constitution provides for immunity in favor of private parties. Here, to the contrary, the Tenth Amendment of the United States Constitution and Article I, Section II of the Pennsylvania Constitution give the Pennsylvania General Assembly the right to regulate the tort liability of the state and their political subdivisions. As the Supreme Court of Pennsylvania observed at p. A-5 of its opinion, the constitutional right to preclude recovery altogether necessarily includes the lesser right to merely limit it:

> If the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted.

Third, plaintiffs rely on this court's analysis under the Due Process Clause of the Fifth Amendment, whereas this is an equal protection claim. The equal protection claim disposed of by this court did not rely upon the multi-pronged "test" plaintiffs have constructed. The only test used was whether the limitation on recovery was rationally related to the declared purpose of the Price-Anderson Act — *i.e.*, to encourage private participation in the exploitation of nuclear energy. This court held that it was. Here, the liability limitation is also justified. It is directly related to the important governmental purpose of protecting the public treasury against unusually large tort recoveries and allowing for reasonable risk management.

CONCLUSION

There are several compelling reasons why this appeal must be dismissed: (1) the order appealed from is not a final judgment; (2) the Pennsylvania Supreme Court did not need to decide the federal constitutional issue in order to dispose of the case, and did not in fact do so; (3) the state constitutional issue, rather than the federal issue, was controlling, and (4) there is not a substantial federal question presented for this court's review. In the alternative, it is respectfully requested that the Order of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

HANDSEL B. MINYARD
City Solicitor

NORMA S. WEAVER
Chief Deputy in Charge
of Claims

BARBARA R. AXELROD
Divisional Deputy in
Charge of Appeals

Attorneys for Appellee
City of Philadelphia.

BRIAN E. APPEL*
First Deputy City Solicitor
Law Department
City of Philadelphia
1500 Municipal Services
Building

*Counsel of Record

Supreme Court, U.S.
FILED
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CLERK

No. 86-1122

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix of the Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of the Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,
Appellants

v.

CITY OF PHILADELPHIA
and
PHILADELPHIA GAS WORKS
and
PHILADELPHIA FACILITIES MANAGEMENT CORPORATION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION OF APPELLEES PHILADELPHIA GAS WORKS AND PHILADELPHIA FACILITIES MANAGEMENT CORPORATION TO DISMISS OR AFFIRM

RUTH RUDBARG WESSEL
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102 (215) 665-3232
Counsel of Record for Appellees Philadelphia Gas Works and Philadelphia Facilities Management Corporation

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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MOTION TO DISMISS OR AFFIRM

Appellees Philadelphia Gas Works and Philadelphia Facilities Management Corporation move this Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that the question on which the cause depends is so insubstantial as not to need further argument, there is an absence of conflict of opinions regarding the question presented and the decision below is so obviously correct as to warrant no further review.

I. STATEMENT OF FACTS

On May 11, 1979, a gas explosion occurred in the Bridesburg section of Philadelphia. The explosion generated forty-six lawsuits seeking damages for personal injury and property damage from various Defendants, including Appellees City of Philadelphia and the Philadelphia Gas Works. In all forty-six cases, the City of Philadelphia and the Philadelphia Gas Works asserted the defenses and immunities available to them under the provisions of a Pennsylvania statute, the Political Subdivision Tort Claims Act.[1] The Political Subdivision Tort Claims Act establishes tort immunity for political subdivisions, but partially abrogates immunity by creating eight categories of cases in which government entities may be sued for damages up to a $500,000 per occurrence cap. Appellee Philadelphia Facilities Management Corporation[2] was named Defendant in seven cases and also asserted the defenses and immunities available to it under the Act.

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1. Act of November 26, 1978, P.L. 1399, No. 330, 5101 *et seq.*, effective January 25, 1979 formerly 53 P.S. §5311.101 *et seq.*, repealed by Act of October 5, 1980 P.L. 693. Similar provisions are now found in 42 Pa. C.S. §8541 *et seq.*

2. Philadelphia Facilities Management Corporation is a nonprofit corporation created by virtue of City ordinance to manage the operations of the Philadelphia Gas Works.

Appellants are Plaintiffs in three of the personal injury cases who jointly instituted this collateral declaratory judgment action to determine the validity of the damage cap. Appellants filed a Motion for Summary Judgment in the trial court requesting a declaration that §5311.402 of the Tort Claims Act, which provides that damages arising from the same occurrence may not be recovered against a political subdivision in an amount in excess of $500,000 in the aggregate, is violative of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The trial court granted the Motion for Summary Judgment and declared the damage cap unconstitutional on the state and federal grounds. The Supreme Court of Pennsylvania reversed on all theories holding, *inter alia*, that the statute fully complies with the requirements of the Equal Protection Clause. Appellants now ask this Court to review the decision of the Supreme Court of Pennsylvania. For the reasons which follow, Appellee submits that this Court should either dismiss this appeal or affirm the decision of the Supreme Court of Pennsylvania.

II. ARGUMENT

A. THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

1. It Is Manifest That The Damage Cap Does Not Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

This Court has repeatedly and consistently held that the rational relationship test is the proper standard of review for equal protection challenges to statutes such as the Political Subdivision Tort Claims Act which impact economic areas. *Dandridge v. Williams*, 397 U.S. 471, 90

S.Ct. 1153, 25 L.Ed.2d 491 (1970) (upholding state law placing an upper limit on the number of children for which any family can receive subsistance payments); *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 90 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (upholding statute imposing monetary limit on liability for nuclear accidents); *Vance v. Bradley,* 440 U.S. 93, 99 S. Ct. 939 (1979) (upholding statute imposing a mandatory retirement age of 60 on some federal employees and not on others); *Parham v. Hughes,* 441 U.S. 347, 99 S. Ct. 1742 (1979) (upholding state law precluding a father who has not legitimated a child from suing for wrongful death of child). Although this Court has not specifically reviewed an equal protection challenge to a state statute limiting tort damages recoverable against governmental entities, the appellate courts of numerous states have applied the principles enunciated by this Court and used the rational relationship test to consider equal protection challenges to such statutes. *See, e.g., Cauley v. City of Jacksonville, Florida,* 403 So.2d 379 (Fla. 1981); *Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983); *Seifert v. Standard Paving Co.,* 64 Ill.2d 109, 355 N.E.2d 537 (1976); *State v. Kallio,* 92 Nev. 665, 557 P.2d 705 (1976); *Estate of Cargil v. City of Rochester, N.H.,* 406 A.2d 704 (N.H. 1979), *appeal dismissed* 445 U.S. 921, 100 S.Ct. 1304, 53 L.Ed.2d 754 (1980); *Sambs v. City of Brookfield,* 97 Wis.2d 356, 293 N.W.2d 504 (1980), *cert. denied* 449 U.S. 1035, 101 S.Ct. 61, 66 L.Ed.2d 497 (1980); *Lee v. The Colorado Department of Health,* 718 P.2d 221 (Colo. 1986); *Home Indemnity v. Anders,* 459 So. 2d 836 (Ala. 1984); *Hallett v. Town of Wrentham,* 499 N.E. 2d 1189 (Mass. 1986).

Under the rational relationship test, a law which subjects different classes of individuals to different treatment will be upheld if there is any possible rational basis for the challenged classification. The burden is on the party challenging the validity of the classification to prove that it is arbitrary. *McGowan v. Maryland,* 366

U.S. 420, 425-426 (1961). The legislature is presumed to have acted within its constitutional power and its judgment "is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Application of the rational relationship test to the damage cap provision in the Political Subdivision Tort Claims Act results in the clear conclusion that the provision passes constitutional muster. The classifications resulting from the damage cap are rationally related to legitimate government objectives and are rationally related to the achievement of these objectives. Although the government may have an interest in allowing victims of government tortfeasors to recover their losses, the government has compelling interests in fiscal stability and solvency, the preservation of public funds for public services and the ability to establish rational fiscal planning and a balanced operating budget. The only way that these goals can be accomplished in this age of enormous jury awards and multiplicity of claims is by placing a limitation on damages. It cannot seriously be questioned that a limit on governmental damage payments rationally relates to the legitimate government interest in preserving sufficient funds for essential public services without imposing an insupportable burden upon taxpayers.

The rational relationship between damage caps and legitimate government objectives has been relied upon by several state appellate courts to uphold limits on governmental liability:

> We have no hesitation in concluding that this statutory classification is reasonably related to the governmental objective of providing fiscal certainty in carrying out the manifold responsibilities of government. By limiting the liability of a public entity to a

> fixed amount, the Governmental Immunity Act protects the public entity against the risk that unforeseen and unlimited tort judgments will deplete the public coffers and result in the termination or substantial curtailment of important governmental functions. The limitations on governmental liability in section 24-10-114(1) and 24-10-118(1)(b), therefore, satisfy equal protection of the laws. *Lee v. The Colorado Department of Health*, 718 P.2d at 227, 228.
>
> It is the Legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate victims for injury, the availability of the cost of insurance, and the financial condition of the governmental units. It is the legislature's function to structure statutory provisions which will protect the public interest in reimbursing the victims and maintaining government services and which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed upon the taxpayers. Giving due deference to the Legislature, this Court will not set aside a statutory classification 'if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504, 511 (1980).

See also, Jetton v. Jacksonville Electric Authority, 399 So.2d 396, 399 (Fla. App. 1981) ($100,000 aggregate damage cap "permitted government units to order their fiscal planning" and rational relationship found between recovery limit and object of the legislation); *Hallett v. Town of Wrentham*, 499 N.E. 2d 1189, 1191 (Mass. 1986) ("Protecting public funds from unlimited liability is a legitimate legislative purpose, and the $100,000 limitation on government liability is reasonably calculated to further that purpose.") *Leliefeld v. Johnson, supra,*

($300,000 aggregate limitation upheld); *Opinion of the Justices,* 493 A.2d 1182 (N.H. 1985) ($200,000 aggregate limit upheld); *State v. Kallio, supra,* ($25,000 limitation upheld); *Consoli v. Municipio de San Juan,* 408 F.Supp. 384 (D.P.R. 1975) ($15,000/$30,000 limit upheld); *Home Indemnity v. Anders,* 459 So. 2d 836 (Ala. 1984) ($100,000/$300,000 limit upheld).

Appellants' entire argument is based on the erroneous contention that the damage cap violates the Equal Protection Clause because the cap may operate to create distinctions between various claimants which are not drawn on the basis of their individual injuries or losses.[3] In fact, there are innumerable constitutionally valid statutes which create categories and distinctions without regard to the individual circumstances of those affected by the law. Contrary to Appellants' contentions, the Equal Protection Clause does not require that a statute address the varying situations of the victims. In fact, there is an abundance of authority which directly refutes the position taken by Appellants. In *Dandridge v. Williams,* 297 U.S. 471, 90 S.Ct. 1153, 1161 (1970), this Court upheld against an equal protection challenge a Maryland Department of Public Welfare regulation placing an absolute limit of $250 per month on the amount of welfare grants a family may receive regardless of the size of the family or its actual need, holding that the regulation was rationally related to the State's interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely

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3. Appellants Jurisdictional Statement suggests that the damage cap does not meet the Due Process requirements of the Fifth Amendment as set forth in *Duke Power Co. v. Carolina Environmental Study, supra.* Appellants' suggestion is without substance or merit. Further, the issue may not be considered by this Court as it was never raised or argued below.

> because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

See also, Duke Power Co. v. Carolina Environmental Study, supra; Vance v. Bradley, supra; Parham v. Hughes, supra.

Although the aggregate nature of the damage limitation can create distinctions between victims of governmental tortfeasors because the amount of recovery may be affected by the number of co-victims of the same occurrence and the extent of their injuries, there is a rational relationship between the aggregate nature of the cap and the purpose of the statute. The aggregate cap obviously facilitates budgeting, risk management and fiscal stability. In fact, in light of the clear relationship between the cap and important governmental objectives, the contention that a damage cap is unconstitutional because it contains an aggregate liability ceiling "is but a thinly disguised version of the contention" that the amount of the cap "is inadequate." *Duke*, 438 U.S. at 91, 98 S.Ct. at 2640. Any argument that the cap should be struck down because the amount is inadequate should be rejected by the Court as an intrusion into legislative prerogatives.

The complete lack of supporting authority for Appellants' argument that the damage cap violates the Equal Protection Clause demonstrates that this appeal does not present a substantial question for review. Appellants cannot dispute that the legislative classifications resulting from the damage cap are justified by the compelling interest of the government to engage in rational fiscal planning and administration, and to preserve sufficient public funds to guarantee government services for the common good.

It is well established that a statute will not be overturned under the rational relationship test "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. at 97, 99 S.Ct. at 943. Appellants have not and cannot make a credible argument that the damage cap is unrelated to a legitimate governmental goal or is irrational. The purposes of the cap, the preservation of sufficient funds for essential public services, rational fiscal planning, and avoidance of an undue burden on the taxpayers, are, indisputedly, important governmental objectives. Despite the Appellants' pleas for judicial legislation, this Court "is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures." *Parham v. Hughes*, 441 U.S. at 351, 99 S.Ct. at 1742. Therefore, this Court should dismiss this appeal or, in the alternative, affirm the judgment of the Supreme Court of Pennsylvania.

2. There Is An Absence of Conflict of Opinions Regarding The Question Presented.

Thirty four states and the Commonwealth of Puerto Rico presently have statutory damage caps in place

which are similar to the provision at issue in this appeal. (See Appendix.) In addition to Pennsylvania, equal protection challenges specific to damage caps on tort recoveries against governmental entities have been mounted in Alabama[4], Colorado[5], Florida[6], Idaho[7], Massachusetts[8], Nevada[9], New Hampshire[10], Wisconsin[11] and Puerto Rico[12]. All of the damage caps have been upheld as meeting the requirements of the Equal Protection Clause. The Montana damage cap, Montana Code Annotated, §2-9-107 (1985), is the only cap which has been invalidated on any ground. The Montana Cap was struck down strictly on state law grounds. *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985). In striking down the law, the *Pfost* Court specifically noted that state constitutional provisions "may be more demanding" than equivalent federal constitutional provisions and, thus, "states may interpret their own constitutions to afford greater protections" than their federal counterparts. *Pfost v. Montana*, 713 P.2d at 500.

All of the state appellate decisions extant uniformly hold or are consistent with the proposition that statutory

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4. *Home Indemnity Co. v. Anders*, 459 So.2d 836 (Ala. 1984).

5. *Lee v. The Colorado Department of Health*, 718 P.2d 22 (Colo. 1986).

6. *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981); *Jetton v. Jacksonville Electric Authority*, 399 So.2d 396 (Fla. 1981).

7. *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983).

8. *Hallett v. Wrentham*, 499 N.E. 2d 1189 (Mass. 1986).

9. *State v. Kallio*, 92 Nev. 665, 557 P.2d 705 (1976).

10. *Estate of Cargil v. City of Rochester*, 119 N.H. 611, 406 A.2d 704, appeal dismissed, 445 U.S. 921 (1980).

11. *Sambs v. City of Brookfield*, 197 Wis. 2d 356, 293 N.E.2d 504, cert. denied. 449 U.S. 1035 (1980).

12. *Consoli v. Municipio de San Juan*, 408 F.Supp. 384 (D.P.R. 1975).

damage caps on tort recoveries from governmental entities meet the requirements of the Federal Equal Protection Clause. The total absence of conflicting opinions concerning this issue clearly demonstrates that further review and argument is not warranted.

3. The Decision Below Is So Obviously Correct As To Warrant No Further Review.

The decision of the Supreme Court of Pennsylvania is consistently, uncategorically and overwhelmingly supported by the decisions of this Court and the highest appellate courts of the states that have considered similar issues. Further, Appellants have not raised a single legally supportable argument to substantiate this appeal. In light of Appellants' failure to cast any doubt on the validity of the decision below and the clear validity of the damage cap provision of the Political Subdivision Tort Claims Act, this Court should dismiss this appeal or affirm the decision of the Supreme Court of Pennsylvania.

CONCLUSION

For al' of the reasons set forth above, Appellees Philadelphia Gas Works and Philadelphia Facilities Management Corporation respectfully request that this Court dismiss this appeal or, in the alternative, affirm the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

Ruth Rudbarg Wessel
Obermayer, Rebmann, Maxwell
& Hippel
14th Floor, Packard Building
Philadelphia, PA 19102
(215) 665-3232

Counsel of Record for Appellees
Philadelphia Gas Works and
Philadelphia Facilities Management
Corporation

APPENDIX

Table of State Statutory Provisions Limiting Damage Recoveries Against Governmental Entities

1. Code of Alabama 1975, §11-93-2 (1985) — $100,000 individual cap, $300,000 aggregate cap
2. Alaska Statutes 1962, §09-17-010 (Michie, 1986) — $500,000 individual cap
3. Colorado Revised Statutes 1973, Volume 101, §24-10-114 (1982 and 1985 Supp.) — $150,000 individual cap, $400,000 aggregate cap
4. Delaware Code, §4013 (1986) — $300,000 aggregate cap or to the extent of liability insurance
5. Florida Statutes Annotated, §768-28(5) (West 1986)— $100,000 individual cap, $200,000 aggregate cap
6. Idaho Code, §6-926 (1986 Cum. Supp. (Michie)) — $500,000 aggregate cap
7. Indiana Statutes Annotated, §34-4-165-4 (Michie 1986) — $300,000 individual cap, $500,000 aggregate cap
8. Kansas Statutes Annotated, §75-6105 (1984) — $500,000 aggregate cap
9. Kentucky Statutes Annotated, §44.070 (1986) — $100,000 individual cap, $250,000 aggregate cap
10. Maine Revised Statute Annotated, Title 14, §§8105 (Supp. 1986) — $300,000 aggregate cap
11. Massachusetts General Laws Annotated, Chapter 158, §2 (Cum. Supp. 1986) — $100,000 individual cap
12. Minnesota Statutes Annotated, §3.746, §466.04 (1986) — $200,000 individual cap, $600,000 aggregate cap
13. Mississippi Code 1972, §11-46-15 (1986 Cum. Supp.) — $500,000 aggregate cap or to the extent of liability insurance
14. Vernon's Missouri Statutes Annotated, §537.610 (Cum. Supp. 1987) — $100,000 individual cap, $800,000 aggregate cap

15. Montana Rev. Code, Sec. 2-9-105 (1985) — $300,000 individual cap, $1,000,000 aggregate cap
16. Revised Statues of Nebraska 1943, §23-2419.01 (1983 and Cum. Supp. 1986) — $1,000,000 individual cap, $5,000,000 aggregate cap
17. Nevada Revised Statutes Annotated, §41.035 (1985) — $50,000 individual cap
18. New Hampshire Revised Statutes Annotated 1955, §507-B:4 (1983 and Cum. Supp. 1986) — $150,000 individual cap, $500,000 aggregate cap
19. New Mexico Statutes Annotated 1978, §41-4-19 (1986) — $300,000 individual cap, $500,000 aggregate cap
20. General Statutes of North Carolina, §§143-291, 143-300.1, 160A-485 (Michie, 1983) — $100,000 individual cap or to the extent of liability insurance coverage
21. North Dakota Century Code, §32-12.1-03(2) (1985) — $250,000 individual cap, $500,000 aggregate cap
22. Oklahoma Statutes Annotated, Title 51, §154(A) (1985) — $100,000 individual cap, $1,000,000 aggregate cap
23. Oregon Revised Statutes, Title 3, Chapt. 30.270 (1985) — $100,000 individual cap, $300,000 aggregate cap
24. General Laws of Rhode Island, Title 9, Ch. 31, 9-31-3, (1985) — $100,000 individual cap
25. Code of Laws of South Carolina 1976, §15-78-120 (1986) — $250,000 individual cap, $500,000 aggregate cap
26. South Dakota Codified Laws, §21-32-16 (Cum. Supp. 1986) — recovery limited to amount of public liability insurance coverage purchased by and provided to governmental entity
27. Tennessee Code Annotated (Supp. 1986) — §29-20-403, $40,000 individual cap, $80,000 aggregate cap ($100,000/$300,000 in motor vehicle cases)

28. Vernon's Texas Code Annotated, Civil Practice and Remedies (1986) — §101.023, $250,000 individual cap, $500,000 aggregate cap
29. Utah Code Annotated 1953, §63-30-34 (1986) — $250,000 individual cap, $500,000 aggregate cap
30. Vermont Statutes Annotated 1985, Title 29, §§1403, 1404, recovery to extent of public liability insurance coverage
31. Code of Virginia, §18.01-195.1 *et seq.* (1983 Supp.) — $25,000 individual cap or to the extent of liability insurance coverage
32. West Virginia Statutes, §29-12A-7 (1985) — $500,000 individual cap
33. Wisconsin Statutes Annotated, §893.82 (1985) — $250,000 individual cap
34. Wyoming Statutes Annotated (Cum Supp. 1986) — §1-39-118, $250,000 individual cap, $500,000 aggregate cap

No. 86-1122 (4)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix
of the Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of
the Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,

Appellants

v.

CITY OF PHILADELPHIA, et al.,

Appellees

APPEAL FROM THE JUDGMENT
OF THE SUPREME COURT OF PENNSYLVANIA

MOTION OF APPELLEE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM

LeROY S. ZIMMERMAN
Attorney General

THOMAS M. CROWLEY*
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

*Counsel of Record

Office of Attorney General
15th Floor, Strawbrry Square
Harrisburg, PA 17120
(717) 783-1471

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No. 86-1122

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix
of the Estate of HARRY F. SMITH, Deceased
and

RITA LADZENSKY, Administratrix of
the Estate of GERALD LADZENSKY, Deceased

and

CHARLES ALEXANDER SCOTT,

Appellants

v.

CITY OF PHILADELPHIA, et al.,

Appellees

APPEAL FROM THE JUDGMENT
OF THE SUPREME COURT OF PENNSYLVANIA

MOTION OF APPELLEE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM

MOTION OF THE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM

Appellee, the Attorney General of the Commonwealth of Pennsylvania, moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of the appeal depends are so insubstantial as not to need further argument.

QUESTION PRESENTED

Whether a statute which allows suits against political subdivisions but which limits the damages recoverable from them violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE[1]

The appellants challenge a provision of Pennsylvania's Political Subdivision Tort Claims Act ("the Act")[2] which limits to $500,000 the damages which can be recovered in an

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[1]Appellee Attorney General of Pennsylvania was deemed to be an intervenor in the appeal before the Pennsylvania Supreme Court pursuant to PA.R.A.P. 521(b) which allows the Attorney General to be heard in any case where the constitutionality of a state statute is called into question. As an appellee-intervenor before the Pennsylvania Supreme Court, the Attorney General of Pennsylvania is a proper party, as an appellee, in the case before this Court. See Rule 10.4, Rules of the Supreme Court of the United States.

[2]Political Subdivision Tort Claims Act, Act of November 28, 1978, P.L. 1399, No. 330, §101 et seq., repealed and reinstated by the Act of October 5, 1980, P.L. 693, No. 142, Section 221(1) Pa. C.S. §§8541-8564, 42 Pa. Cons. Stat. §§8541-8564.

action against a "local agency." Id.[3] Appellants claim that this damage limitation violates the Equal Protection Clause of the Fourteenth Amendment.

The trial court declared the provision unconstitutional under both the Pennsylvania and Federal constitutions. The Pennsylvania Supreme Court however, reversed and held that the provision violated neither the Pennsylvania Constitution nor the Equal Protection Clause. This appeal followed.[4]

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[3]A"local agency" is defined as "[a] government unit other than the Commonwealth government." 42 Pa. Cons. Stat. §8501.

[4]Appellants seek review only of the determination that the damages cap does not violate the Equal Protection Clause. The provisions of the Pennsylvania Constitution are not at issue here. J.S. 4, n.3.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

While appellants devote considerable time to arguing what they consider to be the underlying equities of this case, they purport to raise only one substantial federal question. They claim that the decision of the Pennsylvania Supreme Court is inconsistent with this Court's decision in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (Duke Power). This inconsistency is said to stem from the fact that the Pennsylvania Act has none of the characteristics relied upon by this Court in Duke Power in upholding the Price-Anderson Act's damage limitations provisions.

In fact, no substantial federal question is posed by this case. Quite aside from the fact that Duke Power itself upheld a statute with a per occurrence damage limitation in the face of a Fifth Amendment due process challenge, there is no inconsistency between the rationale of Duke Power and the analysis employed by the Pennsylvania Supreme Court. Moreover, even a cursory examination of this Court's cases involving equal protection challenges to social and economic legislation reveals that the decision of the Pennsylvania Supreme Court is fully consistent with that precedent. The appeal should be dismissed, or the decision below should be affirmed.

1. The Decision of the Pennsylvania Supreme Court is Consistent With This Court's Decision in Duke Power and With its Established Principles of Analysis of Social and Economic Legislation.

a. Appellants purport to find an inconsistency between this Court's decision in Duke Power and the decision of the Pennsylvania Supreme Court in this case. No such inconsistency is present. Even taking into account the unanswered question in Duke Power, viz., whether the Due Process Clause requires that "a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy," Duke Power, 438 U.S. at 88, no substantial federal question is presented by this case.

Appellants do not raise this unresolved issue, but rather see an inconsistency in the characteristics of the Price-Anderson Act, upheld in Duke Power, and the Pennsylvania Act at issue here. They contend that because the Pennsylvania Act has none of the characteristics of the Price-Anderson Act, the Pennsylvania Supreme Court's decision cannot be reconciled with Duke Power. J.S. 8-9.

Appellants miss the point of Duke Power. The analysis of the Price-Anderson Act's characteristics was not undertaken to formulate criteria against which all other statutes which create limitations on damages are to be evaluated. Rather, this Court examined the Price-Anderson Act in the context both of the unresolved question presented

in the case and the longstanding recognition that this Court's cases "have clearly established that '[a] person has no property, no vested interest, in any rule of the common law'" and that the "'Constitution does not forbid the creation of new rights, or abolition of old ones recognized by the common law, to attain a permissible legislative object.'" Duke Power, 438 U.S. at 88, n. 32 (citations omitted).[5] Without resolving the question of whether a legislatively enacted compensation scheme must provide a reasonably just substitute for the common-law or state tort law remedies it replaces, the Court

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[5]As the Court noted, "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." Id.

found the Price-Anderson Act did provide "a reasonably just substitute" for the remedies it replaced.

The inquiry, therefore, is not whether a statute possesses the same characteristics as the statute under consideration in Duke Power, but whether, in light of the general principles that there is no property interest in a common law rule and that such rights may be abolished to attain permissible legislative ends, a statute is so devoid of remedial value as to offend due process. It is thus the characteristics which a statute in fact has, and the legislative objective aimed at, which are relevant under Duke Power.

b. While appellants rely on the due process analysis in Duke Power, their true challenge is based on the Equal Protection Clause. As in Duke Power, appellants' "equal protection arguments largely track and duplicate those made in support of the due process claim." Duke Power, 438 U.S. at 93, a claim rejected by this Court. Analyzing the Political Subdivision Tort Claims Act under this Court's caselaw involving equal protection challenges to social and economic legislation, it is clear that the Pennsylvania Act survives scrutiny.

Appellants concede that the Pennsylvania legislature could simply abolish all actions against the Commonwealth or its political subdivisions.

J.S. App. A-3.[6] They claim, however, that once having allowed some actions, the legislature cannot, consistent with equal protection, limit the damages recoverable. This conclusion is simply not supported by this Court's caselaw, and was properly rejected by the court below.

As this Court pointed out in Hodel v. Indiana, "[s]ocial and economic legislation . . . that does not employ suspect classification or impinge on fundamental rights must be upheld against

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[6]In light of appellents' concession that the remedy could be abolished entirely, their argument (J.S. 5) that the statute does not further the legislative purpose of providing some recovery for tort victims borders on the frivolous. The statute has several opposing purposes which it has reconciled by permitting some, but not necessarily complete, recovery.

equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." 452 U.S. 314, 331-332 (1981)(citation omitted). Moreover, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Id. Such legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's action was irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979). See also Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955).

In this case, the Pennsylvania Supreme Court held that the statute satisfied not just the rational basis test, but also the "intermediate" or "heightened scrutiny" test which the court held was applicable. J.S. App. A-8.[7] The court held that the need to preserve the public treasury in order

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[7]Appellee argued below that the rational basis test was appropriate. Appellee maintains that position here. Statutes limiting damages are precisely the sort of social and economic legislation to which this standard applies. Duke Power, relied upon by appellants, is not to the contrary. Duke Power, 438 U.S. at 93 ("the general rationality of the Price-Anderson Act liability limitations . . . is ample justification for the difference in treatment."). See also Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985), appeal dismissed 54 U.S.L.W. 3250 (October 15, 1985).

to both allow recovery for damages and continue to provide needed public services provides ample justification for the statute even under heightened scrutiny. A fortiori, the statute satisfies the rational relationship standard, and does not violate the Equal Protection Clause.

Appellants' claim that the limitation is capricious because an individual's potential recovery is affected by how many others are injured in the same incident (J.S. 6), fails to consider that the statute has an impact on the interests of both the alleged tortfeasor and the victims. Appellants take no issue with the obvious fact that there are strong state interests in protecting municipalities from ruinous

liabilities. While claims may be predictable within limits, it is the mass disaster situation which is most unpredictable and most likely to bankrupt a local government unit. It is entirely appropriate for the state legislature to put municipalities on the same footing as private parties, whose liability is effectively limited by insurance coverage.

In conclusion, the decision of the Pennsylvania Supreme Court is wholly consistent with this Court's equal protection jurisprudence. Appellants completely fail to show how the Political Subdivision Tort Claims Act violates the Equal Protection Clause under the heightened standard of review employed below, to say nothing of the appropriate -- and far less restrictive -- rational basis test. Because this statute plainly

survives scrutiny, appellees submit that this case is an improper vehicle to examine the question left open in Duke Power, particularly when there is no inconsistency between Duke Power and this case below.

2. A Decision by This Court to Affirm or Dismiss in This Case Would be Consistent With Recent Actions Denying Review to Cases Upholding Statutes Such as That Involved in This Case.

This Court recently dismissed an appeal for want of a substantial federal question in a case closely analogous to the instant appeal. In Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985), appeal dismissed 54 U.S.L.W. 3250 (October 15, 1985), appellants sought

review of a decision of the California Supreme Court which upheld, against an equal protection challenge, a California statute which placed a cap on non-economic damages recoverable in medical malpractice cases. That decision relied squarely on consideration of the legislature's "clearly . . . reasonable basis" in enacting the damages cap in rejecting the plaintiff's equal protection arguments based on the alleged discrimination between medical malpractice and other types of plaintiffs, or between economic and non-economic damages. See discussions at 695 P.2d 683-684. Neither the instant appeal, nor any intervening decision of this Court, requires a result different from that in Fein. The instant case presents no

substantial federal question, and the decision below should be affirmed or the appeal dismissed.[8]

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[8]Appellants cite White v. State of Montana, 661 P.2d 1272 (Mont. 1983), apparently to indicate a conflict among state appellate courts on this issue. In fact, on the specific issue addressed in this case -- the validity of a statute placing a limit on damages recoverable against a governmental unit -- there is virtual unanimity among the states that such statutes are constitutional. See Annot. 43 A.L.R. 4th 19 (1983). Indeed, Montana stands alone in holding such statutes violate the Equal Protection Clause. Id. at 34-35. (A Connecticut municipal ordinance, applicable only to that municipality, was struck down in Ryszkiewicz v. New Britain, 193 Conn. 589, 479 A.2d 793 (Conn. 1984)).

CONCLUSION

The appeal should be dismissed or the decision below should be affirmed.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: THOMAS M. CROWLEY*
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

*Counsel of Record

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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